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Volume LV.
July—December, 1928.

PUBLISHED BY

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PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.

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THE
MADRAS LAW JOURNAL.

VOL.] JULY, 1928. [LV

THE CHILD MARRIAGE BILL AND THE HINDU MARRIAGES DISSOLUTION BILL.

[As it is not proposed to commit the Journal to any particular view on the above measures, the following memorandum is published as representing the personal opinion of the Editor.]

In three articles published in the 28th Volume of the MADRAS LAW JOURNAL, I have discussed at some length the considerations to be kept in view by the Legislature in this country, when it is called upon to enact laws dealing with questions intimately connected with the religious and social usages of the people. I do not wish to repeat them here but I may observe that I was then dealing with a *permissive* measure, viz., The Post-Puberty Marriage Bill. The present Child Marriage Bill is a *coercive* measure and as such it raises even more fundamental and far-reaching issues. I am bound to state, at the outset, that even if I should agree with the promoters of the measure in the object they have in view I should protest against the means adopted to attain that object; but I may also state that I don't agree with them in their diagnosis of our social ills and in the remedy they propose. While even the strongest apostle of the doctrine of individual liberty must agree that there are certain matters in respect of which the State has got the right to impose its will on the citizen, it cannot, on the other hand, be denied that such categories are strictly limited and well defined. The institution of marriage is not *new* to Hindu Society and the State is not now called in to regulate it as such.

Social reformers in this country have all along maintained that the practice of early marriage has led to untold ills. Those who have differed from them do not shut their eyes to the ills themselves but have differed in their views as to the causes

therefor and the appropriate remedy. I may be pardoned for saying that in this latter category of dissentients are included not merely those who have not had the benefit of Western education but many educated Indians as well.

In discussing this subject, it must be clearly borne in mind that amongst Brahmins—who are the class mainly affected by the proposed legislation—the 'marriage' ceremony is altogether different from "consummation" and that ordinarily an interval of several years separates the two. The reformers' arguments are mainly derived from the existence of child widows of 5 years and less, but marriage at such young age is not due to shastraic injunctions or the force of social opinion and the bringing in of such exceptional instances will only serve to cloud the real issue. The main conflict must be understood to be between those who in obedience to the rules of the Hindu Shastras feel bound to marry their girls between the ages of 10 and 12 and those who would set such restrictions at nought. We have no quarrel with those who in their own domestic concerns prefer to do what they think best, but what is the justification for their *compelling* others to violate the injunction of the Shastras which the latter honestly and sincerely consider are binding upon them. The compulsory age-limit fixed in the Smritis relates only to the marriage ceremony in the sense above explained and not to consummation and that is why the orthodox party insist that the shastraic rules are not really responsible for the ills complained of.

It is often asked what connection there is between religion and the marriageable age. It may as well be asked what relation there is between religion and marriage. The answer will depend on what one may assume to be the basis and proper sphere of religion. The view that marriage should be no more than a 'civil contract' is intelligible enough; but in so far as its 'sacramental' character is granted, it is not illegitimate to insist that the authority on which such sacramental character is founded should be fully respected—and not only so far as we may choose to approve. To this again it is said by way of retort, whether Hindu society has not deviated in many respects from shastraic injunctions. True, it has; but it cannot be maintained that two wrongs make a right. Each deviation, when it *has come* about, may be considered and encouraged or discouraged on its own merits, but one deviation does not necessarily warrant or justify another.

In the present instance, the weakness of the argument based on the hardships of widowhood is shown by the fact that the Widow Remarriage Act of 1857 still remains a dead letter. For the present purpose, however, it is sufficient answer to that argument to state that it can make little difference in this respect whether a girl is married at 12 or at 14.

As to the charge of physical deterioration of the race, the best answer is furnished by the indisputable fact that the Brahmin community has maintained its vitality and its intellectual powers through thousands of years. If recently it has deteriorated, some of us think, it is due to the fact that it has departed from Brahmin ideals and practices. Even to-day, it is a matter of common knowledge that orthodox people enjoy much better health than the English educated classes and our reformers would do well to direct their attention to this aspect of the matter and draw the correct inference. It is a mistake to regard premature maternity as a *necessary* result of the shastraic system of marriage. The proper education of public opinion can without any violation of religious rules or practices bring about a marked advance in the age when consummation is to be permitted. Suppose, on the other hand, a girl who is married at the age of 14 (as prescribed in the Bill) gives birth to half a dozen children or more between her 15th year and her 25th year—and this is quite a common occurrence—where is the improvement of the race which the reformer is in quest of. To be frank, this result can be achieved only by training our youths in habits of continence and self-control—and this will be a more worthy object for the reformer to strive after.

It is then said that early marriage stands in the way of the advance of female education. This again is not a correct diagnosis. It is not the celebration of the marriage that prevents many of us from sending our girls to school, but we think that beyond a certain age it is not desirable to send our girls to mixed schools. With the increase in the number of institutions where girls can receive higher education without mixing with boys, the position may undergo some change but it must also be stated that in the opinion of most of us, the kind of higher education now available in our schools is not what is required for our girls. Whether we are right or wrong in this view, I only wish to emphasise the position that it is not correct to associate the question of female education with the

topic now under discussion as if they stand in any relation of cause and effect.

With reference to the true ideal of marriage and its basic conceptions, such of us as hold the orthodox view are not disposed to give up the conception of the 'religious sacrament' (and all that it implies) in favour of the contractual theory nor are we prepared to believe that a girl of 14 or 16 or even 18 is better fitted to choose a husband for herself than her parents can do or are likely to do for her. A case of an unnatural parent may be found here and there but that can no more justify a generalisation than the instances of 'love' marriages which come before the Divorce Court within a few months of their celebration.

Even assuming that the underlying principle of the Bill is on the whole sound, there are obvious objections to embodying it in a penal statute fixing a statutory minimum—for the offence would have been committed even if the spouses fall short of the minimum age by a few *days*. Take a few instances, which in the present state of our society are quite familiar and note the hardship : (i) A parent (oftentimes the mother) who is seriously ill is anxious to see the daughter married in her own life-time. Any one who knows the Hindu mother's solicitude for her daughter will realise how cruel it would be if the law should step in and say, 'No, it will be some months before your daughter will complete the statutory age, and the marriage shall not take place before that—though you may not live to see it'. And it will be preposterous to suggest that if in such circumstances the marriage is allowed to be celebrated before the statutory age, the girl's interests will be sacrificed. (ii) A girl in her fourteenth year is very near the period of her puberty (if she had not passed it) and the parents are anxious to celebrate her marriage before puberty; but it may easily happen that she will complete 14 only after the month of July, and Brahmins do not ordinarily celebrate marriages between July and December. What is the poor father to do? Wait for the new year in hourly dread of her attaining puberty before that. (iii) Take again the case of a father with two girls aged 14 and 12 respectively. It is common knowledge that the celebration of a marriage involves a heavy financial strain on the parent and not even a stroke of the 'legislative' pen can altogether obviate it—is the father to be told that even if he could find a suitable match for the younger girl he should not

celebrate the two marriages at one time but must incur the same expenditure over again a couple of years later.

The proposed legislation is a serious menace to all who sincerely believe in the binding character of the Hindu Shastras. I know the familiar gibe of the reformer against the orthodox, that the latter will always raise the cry of 'religion in danger'. I am content to leave it to any impartial reader to go through the foregoing paragraphs and decide how far the gibe is in the present instance justified. I hope that our progressive friends will give some of us credit for sincerity of purpose and of conviction. We are as much interested in the welfare of our children as our friends are and likewise in the future of our country. If we differ from them on the present subject, it is because we honestly believe that the time-honoured practice of the land is the best for us all in the long run. Surely, the subject is not so simple nor the experience of other countries so encouraging that any prudent man can afford to dogmatise or maintain that his view *alone* is right. It is extremely unfair that those who hold the orthodox view should be driven to choose between the jail and their religion. It is a matter for the deepest regret that the reforming zeal should create a spirit of uncompromising intolerance for those who differ, the spirit that demands that the proposed law should be enforced by 'deterrent' penalties.

If legislation on the lines proposed is to be persisted in, the utmost that orthodox opinion can be expected to be reconciled to is a minimum age of 12 in the case of girls. Personally I should have no objection to 14 or 15 being fixed as the age for *consummation* and while I do not underrate the difficulties in the way of detecting and punishing breaches of a restriction of that kind, I am of opinion that legislation even of that kind may have some educative effect. I would recommend that even the present Bill should in the main be regarded as only educative and all vindictive punishment should be avoided. The penalty must be comparatively light—imprisonment being in any event out of the question.

I would also suggest the insertion of a provision empowering Local Governments (i) either to exempt particular classes from the operation of the Bill, or (ii) from time to time to fix the minimum marriageable age in respect of particular classes or communities This power, if exercised in a spirit of liberal discretion, would help to make the change more gradual and

less violent and temper the administration of the new law with due regard to local conditions and the change which in course of time may be expected to come about in the opinions and practices of particular communities.

Under clause 5 of the Bill as it stands, a poor priest who may participate in the marriage ceremony will incur the penalty. This is undesirable; it does not seem right to insist that a priest who is called in to officiate at a marriage—may be, he is a stranger to one or other of the parties or even to both—should at his peril satisfy himself beforehand as to the age of the spouses. The responsibility and liability must be cast only on the parents or guardians.

The Marriages Dissolution Bill is, of course, only an enabling measure. Opinions have differed and will continue to differ as to the expediency of providing legal facilities for divorce; I do not, therefore, propose to say anything on the general aspects of the question But I would request our legislators to deal with the proposed relief on its own merits, in the light of modern experience in other countries and not be misled by Dr. Gour's appeal to the authority of the ancient texts of Hindu Law. Time was when great importance was attached to the possession of male progeny and in view of the social conditions then prevailing, the best that early law could do was to establish the 'reign of law' by bringing within its pale and giving the protection of law to several kinds of unions which were in fact taking place (*cf.* the Rakshasa and Paisacha forms of marriage). That is certainly not the view-point of an age that claims to be civilised nor the purpose of a measure introduced in an era when most of our educated people are under the spell of the latest theories of contraception. Nor is Dr. Gour right in using texts which lay down the qualifications of a would-be spouse as authority for the position that the absence of such qualifications would justify the dissolution of a completed marriage. The reference to Niyoga is also out of place for that was not a practice meant to provide for the material comforts and much less for the sentimental or sensual satisfaction of the woman. She was not even a free agent in the matter. She had to consort with only such person as the elders might choose for her. In the words of an Indian critic, that custom "took it for granted that woman was only a chattel or a 'field' owned by some man. How can a 'property,' though it be living, have

a voice in the matter of its disposal by its owner. There could be no question of feeling". (Hinduism, by Govinda Das, p. 285.) Surely this is not the kind of liberty or solace that Dr. Gour is anxious to secure for the women of to-day.

Going to the provisions of the Bill, I would point out that a clear line of demarcation should be maintained between (i) dissolution of a marriage, and (ii) a declaration of invalidity of a marriage; for the latter will affect the legitimacy of the offspring. It may not be correct to lay down the same causes as justifying both kinds of relief and the point of time with reference to which the existence of the justifying cause must be determined will also vary in the two cases.

As to the causes specified in clause (2), one cannot help observing that they are largely questions of degree and by no means easy of application in practice. I know from professional experience how difficult it is to formulate a safe workable test as to imbecility and I have read of cases in which eminent medical men have given diametrically opposed opinions as to the alleged impotency of a person. I understand that impotency may sometimes be the consequence of excessive indulgence and I don't know if it is the promoter's idea that late in life a man should be called upon at the instance of his wife to submit to an investigation as to his potency. In the case of leprosy, there are different opinions held as to its curability and we do not know what the further advance of medical science may bring to the relief of this unfortunate class of sufferers. Is it intended that as soon as a person shows signs of the specified kind of leprosy the wife is to have a right to ask for divorce; if not, what is the stage at which the Court is to grant it.

It is scarcely fair to impose on the Court an unpleasant and at the same time ill-defined task. Cases where a Court feels constrained to refuse a dissolution do more harm than good to society as well as to the individuals concerned. I must also say this, that, while no one can question the right of every woman to a full share of the pleasures of married life, it ought not to be forgotten that there are higher and nobler incidents of that relationship than mere physical pleasures or material comforts. What is the ideal which society ought to set before any woman who may have the misfortune to find her husband afflicted with a cruel and loathsome disease, to desert him and seek her own

pleasure or to minister to him to the best of her ability and to the last breath of her life—I have no doubt as to what the Hindu ideal is.

The Bill must make clear and adequate provision as to the legal consequences of an invalidation or dissolution under it. The marital tie may be severed but what about guardianship of children, inheritance between mother and children or the obligation of the son to maintain the mother, inheritance between the woman and the other relations of the husband, etc. The provisions in this behalf contained in the Widow Re-marriage Act have given rise to certain difficulties, but the practical working of this Bill may give rise to further questions, for a woman may not necessarily re-marry after a dissolution. What then is to be her position in respect of her sapindaship with the members of her husband's family.

In framing the processual provisions (promised to be added) it may have to be considered whether it is not necessary to prescribe some period of limitation in respect of one of the reliefs dealt with in the Bill, *viz.*, declaration of invalidity of the marriage. If, as I presume, the declaration is to be founded only on causes that existed at the date of the marriage, it is scarcely desirable to allow the question to remain in suspense for an indefinite length of time.

THE HINDU WOMEN'S RIGHTS AMENDMENT ACT.

We publish below the text of a Bill amending some of the rules of the Hindu Law regarding the rights of women. The Bill is said to have been prepared by Mr. D. W. Kathaley, B.A., LL.M., Advocate, Nagpur, and Mr. N. V. Bhonde, B.A., LL.B., Pleader, Poona, Secretaries of the Hindu Law Research and Reform Societies. We are informed that Mr. M. R. Jayakar, Bar.-at-Law, M.L.A., will introduce it in the Legislative Assembly after making suitable modifications therein and in the meanwhile it is desired to invite discussion and suggestions on the points involved.

WHEREAS it is expedient to amend certain provisions of Hindu Law, it is hereby enacted as follows:—

Short title.

1. (1) This Act may be called THE HINDU WOMEN'S RIGHTS AMENDMENT ACT, 192 .

Commencement.

(2) It shall come into force at once.

and extent.

(3) It applies to the whole of British India.

Rights of adoptive mother.

2. (*a*) Irrespective of the fact whether the adopted son becomes entitled to the rights and interests of the adoptive father by survivorship, succession or by divesting the estate of the adopting widow, the adopted son shall be entitled to one-fourth share thereof and the remaining three-fourths shall remain vested in the widow (in the adoptive mother).

(*b*) The adoptive mother shall have a widow's estate in the property and on her death it will devolve on her daughter, and, in the absence of the daughter, on the daughter's son, in default of the daughter and the daughter's son, the adopted son shall be entitled to the same.

NOTES ON CLAUSES.

According to the Privy Council decision in *Krishnamurti* v. *Krishnamurti*,[1] an agreement entered into by the adopting widow

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1. (1927) L.R. 54 I.A. 248: I.L.R. 50 Mad. 508: 53 M.L.J. 57 (P.C.).

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with the father of the boy to be adopted by which she prevents her estate from being divested in whole or in part is invalid. In many cases where a person is adopted as a son, he scarcely remains grateful to his parents and disputes often arise between the adoptive mother and the adopted son and the former does not possess even sufficient resources to bring a suit for maintenance and is required to sue as a pauper. It may be noticed that in the above case if the adoptive mother would have been a mother of two sons and there would have been a partition of the ancestral estate between them, she would have been entitled to a one-third share in accordance with the text of Yajnavalkya, II. 123 (पितुरूर्ध्वं विभजतां माताप्यंशं समं हरेत्): "Where the sons divide the ancestral property after the death of their father, their mother is entitled to an equal share." In other words, she would have been entitled to the share to which a son is entitled. Now the rights of the adopted son in competition with the rights of the natural son are variously stated to be one-third, one-fourth, one-fifth (*see* Mayne's Hindu Law, page 232, para. 168). The clause gives to the adopted son the share to which he would have been entitled in the presence of a natural born son. The fiction of adoption, however meritorious it may be, has unnecessarily aggrandised the status of the adopted son to the prejudice of the adoptive mother. There need be no fear that, on account of the above provision, the adopting mother would not be able to find boys to adopt.

Testamentary capacity.

3. A member of a joint Hindu family shall be entitled to execute a will of his share or a portion thereof.

NOTES ON CLAUSES.

At the law stands at present a coparcener cannot execute a will in respect of his share or a portion thereof in the joint property in favour of his widow, daughter, sister or any other female or male relation. A will executed by him is invalid. If one minute before the execution of such a will, he makes an unequivocal declaration of his intention to separate as was the case in *Girjabai* v. *Sadashiv*,[2] then such a will becomes valid. It is not desirable that such a declaration should be a condition precedent to the validity of the will. The will itself is a sufficient unambiguous declaration of his intention to treat himself as a person entitled to dispose of the property as if he were a tenant-in-common.

Removal of sex disqualification.

4. No female shall be disqualified from inheriting simply by reason of her sex.

2. (1916) L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031: 31 M.L.J. 455 (P.C.).

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C. NOTES ON CLAUSES.

This clause overrules the rule laid down in Taittiriya Samhita to the effect that a woman is weak and is incompetent to inherit (निरिन्द्रिया ह्यदायादाः स्त्रियः).

The exceptions which have been engrafted on the rule from time to time in favour of the widow, daughter, mother, paternal grandmother, sister, paternal aunt, girls born in the family (who according to the Bombay School get an absolute estate), widows of gotraj sapindas, have practically eaten away the rule. But the instances where that rule still operates illustrate the great hardships. As stated in paragraph 557, page 819 of Mayne's Hindu Law latest edition, daughter can only inherit to her own father and the daughter of the brother, the uncle or the nephew is not an heir and so if one of two undivided brothers under Mitakshara Law dies first, leaving a daughter, and afterwards the surviving brother dies childless, the estate will pass to his collateral relations, but not to the daughter of the first brother. In Bombay Presidency a grand-daughter, a brother's daughter, and a sister's daughter are held capable of inheriting on the principle which prevails in Western India that females born in the family are gotraja sapindas but they come in, however, not as daughters but as distant kindred, and hence some time after the agnates in the fourteenth degree are exhausted. As regards widows as stated in paragraph 529, page 765 of Mayne's Hindu Law, no claim as heir can be set up on behalf of the widow of a son or grandson, or daughter's son, or father, or brother, or uncle, or a cousin and the Crown would take by escheat in preference to her. This is undoubtedly the law of Bengal, Benares, Madras and Mysore, though according to the law as prevailing in the Western India their position is slightly better as they become entitled to succeed after the "compact series of heirs" ending with the brother's son. This is very little consolation in many cases, for example, if a father and his son are attacked by plague and the father dies first and the son dies afterwards, the son's widow inherits the property, but if the son dies first and the father dies afterwards, the son's widow is not entitled to succeed at all according to the law prevailing throughout the whole of India excepting Bombay, where she would succeed only if her father-in-law's brother or his son (including grandson and great-grandson) are not alive. A near relation, *e.g.*, mother's sister is not an heir throughout India on account of this rule.

The reason for excluding females from succession is to be found in a text of Taittiriya Samhita which is usually translated as follows:—

"Women are weak and therefore they are incompetent to inherit" (निरिन्द्रिया ह्यदायादाः स्त्रियः).

According to the view of Brahmaranya in the Madhaviya commentaries on Parashara-smriti, "Adayada" means incompetent to drink soma juice and has got nothing to do with the incompetency to inherit. See *Lallubhai Bapubhai* v. *Mankuvarbai*.[3] It may be further noticed that a lady is the widow of one man, mother of another, sister of a third, niece of a fourth and a widow of a gotraja sapinda so far as related to different persons. Keeping aside the cases arising in Bombay Presidency, the law as regards the succession is that she should be excluded from succession in the capacity of a sister or a niece or a cousin or the widow of a gotraja sapinda because she is weak and incompetent to inherit, to use the language of Taittiriya Samhita (तैत्तिरीयसंहिता). But she inherits in the capacity of a widow, daughter, mother and grandmother because though she is weak, she is competent to inherit. To insist in these days upon retaining the disability to inherit is not only anomalous but perpetuating a grave injustice. It may be noticed that in England there is already a Sex Disabilities Removal Act and that in India the disqualification to vote on account of sex has been removed by various local Councils. The disqualification to inherit should also disappear.

Shares of females.

5. The female entitled to inherit shall rank as if she were a male, but, unless otherwise provided for, the share of a female shall be half of that of a male standing in the same degree of relationship.

Illustrations.

1. Son and daughter shall together inherit the property of their father but the share of the son shall be double the share of the daughter.

2. Sister and brother shall inherit together the property of their brother but the share of the brother shall be double the share of the sister.

3. Maternal aunt and maternal uncle will inherit together the property of the nephew, but the share of the maternal uncle shall be double the share of the maternal aunt.

NOTES ON CLAUSES.

This provision is necessary, as the disqualification to inherit, which attaches to the female sex as such, is removed.

Females entitled to widow's estate.

6. Females inheriting by virtue of the provisions of this Act shall be entitled to a widow's estate in the property.

NOTES ON CLAUSES.

The bills framed by Sir Bhashyam Aiyangar and Seshagiri Aiyar provided that the females inheriting under the Acts shall be

3. (1876) I.L.R. 2 Bom. 388 (428) (F.B.).

entitled to a widow's estate in the property. The provision for allowing the females to inherit the property is one thing and to give them absolute rights in the property is another. In Schopenhaur's Studies in Pessimism, it is observed that the rule by which absolute ownership is conferred on female heirs in European countries is of questionable soundness.

Rights of a widow, and a daughter.

7. (*a*) Notwithstanding anything to the contrary in the Mitakshara School of Law, a widow shall be entitled to inherit the rights and interests of her husband, in the absence of a son, irrespective of the fact whether he was a member of a joint Hindu family or not.

(*b*) In default of the widow, the daughter shall succeed in similar circumstances.

NOTES ON CLAUSES.

In suggesting the various reforms to be made in Hindu Law the principle followed in this bill is to extend a reform already made in one province to the other provinces. According to the Dayabhag School of Law a widow inherits the right and interests of a sonless husband and in default of the widow, the daughter succeeds in similar circumstances. The reform has been made by Jeemutvahan who lived in 1092 A.D. (See *Rajani Nath Das* v. *Nitai Chandra Dey.*[4]) This reform which has been made in Bengal by the Pandits more than eight hundred years ago is now extended to the other provinces. If one looks to the reasoning of the author of Dayabhag, it is indeed plausible. He too relies on the text of Yajnavalkya, II. 135, 136, referred to by the writers of the Mitakshara School:

पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा ।
तत्सुता गोत्रजो बन्धुश्शिष्यः सब्रह्मचारिणः ॥
येषामभावे पूर्वस्य धनभागुत्तरोत्तरः ।
स्वर्यातस्य ह्यपुत्रस्य सर्ववर्णेष्वयं विधिः ॥

but points out that that text as well as other texts nowhere state that the deceased should be a separated member from the other members of the family. See the point about the widow's right of succession discussed at elaborate length by the author of Dayabhag (दायभाग) in Chapter XI, section 1, which for the sake of convenience would be found in pages 68 to 81 of Setlur's translations of Hindu Law Books, Part II, found in the same book.

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4. (1920) I.L.R. 48 Cal. 643 (687, 736) (F.B.).

The reasons applicable to the case of the succession of a widow are applicable also to the case of a daughter and she should be entitled to succeed irrespective of the fact whether her father was joint or separated. According to Brihaspati, the daughter is the heir in default of the widow, daughter is born from the parents just like a son; how can any one else take the property while she is alive.

भर्तुर्धनहरी पत्नी तां विना दुहिता स्मृता।
अङ्गादङ्गात्सम्भवति पुत्रवद्दुहिता नृणाम्।
तस्मात्पितृधनं त्वन्यः कथं गृह्णीत मानवः॥

The text was one of several upon which the right of the daughter to inherit was founded. The principle recognised in this text has been given a more extended application. The succession of a daughter to the estate of her father whether he was joint or separated from the other members of the family is allowed in Bengal like the succession of the widow since more than eight hundred years ago by the author of Dayabhag as pointed out above. This reform is now extended to other provinces.

According to the Privy Council decision in *Girjabai* v. *Sadashiv*,[2] if a coparcener makes an unequivocal declaration of his intention to separate, his share passes to his widow and in her default, to his daughter. The effect of this clause is to allow the interest to be inherited by the widow or the daughter, even though there may be no such declaration.

Widow's share.

8. In the case of property passing by inheritance or survivorship to a son, the widow shall get a share equal to that of a son.

NOTES ON CLAUSES.

In partition of ancestral property amongst the sons, their mother gets a share equal to that of a son in accordance with the text of Yajnavalkya, II. 123 (पितुरूर्ध्वं विभजतां माताप्यंशं समं हरेत्): "In the case of sons dividing after the death of the father their mother is entitled to an equal share." This principle is extended to the case of inheritance also.

Removal of restrictions on the right of daughters to inherit.

9. (*a*) Notwithstanding anything to the contrary, an unmarried daughter and a married daughter shall succeed equally to the estate of their father.

2. (1916) L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031: 31 M.L.J. 455 (P.C.).

(*b*) Notwithstanding anything to the contrary in the Mitakshara School of Law, a rich daughter and a poor daughter shall succeed equally to the estate of their father.

(*c*) Notwithstanding anything to the contrary in the Dayabhag School of Law, a widowed daughter destitute of male issue, or a barren daughter whose husband may be alive, or a daughter who is the mother of daughters only, shall be entitled to inherit the property.

(*d*) A custom excluding daughters from succession shall not be enforced by the Courts.

NOTES ON CLAUSES.

(*a*) An unmarried daughter excludes the married daughter because the former is still in the gotra of her father while the latter has passed out of it. This can scarcely be regarded as a justifiable ground for excluding the married daughters, especially in those cases where the estate is a big one.

(*b*) In no case the heirship is made dependent on the fact of the heir being poor. A rich sister or brother inherits the property along with a poor sister or brother.

(*c*) According to the Bengal School "In no circumstances can the daughters who are either barren, or widows destitute of male issue, or the mother of daughters only, inherit the property." *See* Mayne's Hindu Law, para. 558, p. 820. According to a decision of the Calcutta High Court, a married daughter governed by the Dayabhag School of Law, who has got a son, excludes a childless widowed daughter of child bearing age, though there is a custom of widow re-marriage in the caste. See *Binodini* v. *Susthee.*[5] As against this may be contrasted the view adopted in a recent English case where it was laid down that it was not permissible in determining rights at law to enquire into the capacity of women to bear children, and that the Court ought not to make the presumption that a woman is past child bearing, though she may be 65 years old. See *In re Deloitte*: *Griffiths* v. *Deloitte.*[6]

These daughters are excluded in Bengal from succession on the ground that as they have no son, the propositus does not get a *pinda* from him. They are thus disinherited for no fault of theirs and if a right of inheritance is conferred upon them by the legislature, no calamity will befall the orthodox Bengal, especially in view of the

5. (1920) I.L.R. 48 Cal. 300.
6. (1926) 1 Ch. 56.

fact that such daughters are allowed to succeed to the property of their father in all other provinces.

(*d*) This clause declares as invalid the custom prevailing in certain places by which daughters are excluded from succession to the estate of their father. *See* Mayne's Hindu Law, para. 557, page 818 note, *N. Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[7] and *Parbati* v. *Chandrapal*.[8] The rule that clear proof of usage will outweigh the written text of the Law (शास्त्राद्रूढिर्बलीयसी) has been criticised by a Mimamsa writer, Khanda Dev in his Bhatta-deepika, as follows:—

यदपि शास्त्राद्रूढिर्बलीयसीति वचनं पुरस्क्रियेत न तदपि समञ्ज-सतामवगाहते । यदा व्रीह्यपेक्षया तृणवृद्धिर्विशिष्यते तदा कृषीवलस्तां निरस्य धान्यवृद्धावेव प्रयतते ।

As an agriculturist in order to keep his crops in good condition removes the weeds and makes efforts only for the improvement of the crops, similarly a lawyer must find out what are the unnecessary excrescences which have come into existence since the time the textual law was written, and remove them.

Widows of sapindas entitled to inherit.

10. Notwithstanding anything to the contrary in the Mitakshara or the Dayabhag School of Law the widow of Gotraj Sapindas and Bhinna Gotra Sapindas will be entitled to inherit, and shall occupy the same place in the list of heirs, which their sons, if living, would have occupied, subject to the right of any person whose place is specially fixed under the Hindu Law as modified by this Act.

NOTES ON CLAUSES.

According to the Bombay School, the widow of Gotraj Sapindas stand in the same place that their husband if living would respectively have occupied, subject to the right of any person whose place is specially fixed.—*See* Mayne's Hindu Law, para. 585, page 860 (*e*). This rule is extended to cases governed by the other schools. Further the rule which entitled the widows of Gotraj Sapindas to inherit has been also extended to the widows of Bhinna Gotra Sapindas. Under the present law maternal uncle's son is an heir but the wife of the maternal uncle is not entitled to inherit. The provision removes this anomaly. The position assigned to them is not that which their husbands, if living, would have occupied, as, *i.e.*, this would exclude the maternal uncle's son when the maternal uncle's wife is alive.

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7. (1907) L.R. 35 I.A. 1: I.L.R. 30 A. 1: 17 M.L.J. 605 (P.C.).
8. (1909) L.R. 36 I.A. 125: I.L.R. 31 A. 457: 19 M.L.J. 605 (P.C.).

Right to demand a partition.

11. Notwithstanding anything to the contrary in the Mitakshara or the Dayabhag School of Law, a female entitled to a share shall be entitled to get it separated by partition.

NOTES ON CLAUSES.

When the partition takes place after the death of the father, the mother and the grandmother are each entitled to a share equal to that of the sons, and the unmarried daughters each to the fourth of a share. If the sons chose to remain undivided, they have a right to do so. The women of the family can never compel a division, and are entitled to no more than maintenance. *See* Mayne's Hindu Law, para. 477, pages 689, 690 (*s*) (*t*). The present clause enables them to get their right enforced like any other male entitled to a share. As the share obtained on partition does not become Stridhan (*see* Mayne's Hindu Law, para. 658, page 969 (*m*-1), the property will go back to the stock from which it came.

Priority in the case of certain female heirs.

12. A step-mother, a predeceased son's widow, a predeceased son's daughter, shall be entitled to succeed equally with a son, or in his default with the widow, or in her default with the daughter, or in the default of all these persons, with the daughter's son.

A daughter's daughter shall be entitled to rank as a daughter's son and a sister shall be entitled to rank as a brother for the purpose of inheritance.

NOTES ON CLAUSES.

The heirs mentioned in the above clause deserve a priority which is not allowed to them by law even where they are recognised as heirs.

Agnates not preferred to cognates.

13. An agnatic relation shall not be preferred to a cognatic relation merely on the ground of his relationship being agnatic but a person who is a nearer sapinda shall exclude a sapinda who is more remote. Where the persons claiming the inheritance are equally remote from the propositus, they will succeed together whether they are agnates or cognates.

Illustration.

1. A brother's son and a sister's son will succeed in equal shares.

NOTES ON CLAUSES.

Effect is given to the principle underlying the text of Manu, IX. 123: "To the nearest sapinda the inheritance next belongs" (अनन्तरः सपिण्डाद्यः तस्य तस्य धनं भवेत्) Irrespective of the

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fact whether the sapinda is a sagotra sapinda or bhinna gotra sapinda. This principle is adopted by Dayabhag School of Law and is now extended to the other schools.

SUMMARY OF ENGLISH CASES.

ANDERSON-BERRY, *In re,* (1928) 1 Ch. 290: 97 L.J.Ch. 111.

Administration—Administrator with sureties of estate of intestate—Administrator threatening to distribute assets without providing for possible liability—Right of surety to bring quia timet *action.*

Where the administrator of the estate of an intestate person threatened to distribute the assets without providing for a possible liability which might fall on the estate,

Held, that the sureties of the administration bond were entitled to bring an action *quia timet* against him to restrain him from distributing the estate.

DEBTOR, *In re,* 97 L.J.Ch. 120.

Bankruptcy—Judgment for £500 and costs—Petition for receiving order—Dismissal of petition on terms—Terms amounting to extortion—Default by debtor in acting up to the terms—Second bankruptcy petition—Bankruptcy Act (1914), *S.* 5 (3).

A debtor incurred a debt of £500 in connection with an underwriting agreement with a company. The creditor obtained a judgment for £500 and costs against the debtor, served a bankruptcy notice and then filed a petition for a receiving order. The petition was dismissed upon terms one of which was that the debtor should pay in instalments the costs between solicitor and client of the proceedings taken against him and against the company. The debtor paid one instalment in pursuance of this but made default afterwards. The creditor filed a fresh bankruptcy petition upon whom a receiving order was passed.

Held, that the debtor was not, in law, liable to pay the costs of the action, as between solicitor and client, brought by the creditor against the company and the terms to that effect amounted to an extortion from the debtor, and therefore the receiving order must be discharged.

A creditor cannot be allowed to utilise bankruptcy proceedings for the purpose of extorting, or attempting to extort, money from the debtor for which the debtor is in no sense liable.

GLANVILLE *v.* SUTTON, (1928) 1 K.B. 571.

Negligence—Horse biting the plaintiff—The defendant's knowledge of the propensity of the horse to bite other horses—Proof of 'scienter'—Liability of the horse-owner.

The mere fact that the defendant had knowledge of the propensity of his horse to bite other horses would not be sufficient evidence of knowledge of a propensity to bite mankind.

COMMISSIONERS OF INLAND REVENUE *v.* HAWLEY, (1928) 1 K.B. 578: 97 L.J.K.B. 191.

Income-tax—Specific legacy of shares in a company—Dividend accruing due between death and executor's assent—Liability to income-tax.

A specific legacy of a number of shares in a company was not assented to by the executors until some two years after the death. Dividends had accrued in the meantime and, although payable to the executors, were not actually paid because the company claimed a debt due from the testator but when the debt was paid off and the executors assented, the equivalent of the dividends was allowed to the legatee.

Held, that the dividends should be treated as income of the years in which they accrued due, and not of the year in which assent was given to the legacy and their equivalent was paid.

ARNOLD AND WEAVER *v.* AMARI, (1928) 1 K.B. 584: 97 L.J.K.B. 238.

Husband and wife—Divorce proceedings—Wife engaging solicitor—Non-appearance of the wife on the date of hearing—Decree against wife—Solicitor's error in not obtaining security for her costs—'Necessaries'—Agency of necessity—Whether husband liable to wife's solicitor for costs.

In divorce proceedings instituted by a husband against his wife on the ground of her adultery the wife engaged a solicitor to prove her innocence. On the date of hearing, the wife did not appear and a decree was obtained by the husband. The wife's counsel applied for costs, but as no security for costs had been obtained no costs were granted. In an action brought by the wife's solicitor to recover the costs from the husband,

Held, that the solicitor could not recover the costs from the husband, as in these circumstances the wife had no authority to bind her husband.

HOWELLS *v.* GREAT WESTERN RAILWAY, 97 L.J.K.B. 183.

Workman's compensation—Accident arising in the course of employment—Dock labourer working in docks—Provided route over a metalled road—Shorter cut involving the crossing of a number of railway lines—Shorter route accustomed and permitted—Labourer proceeding on shorter route killed by light engine.

There was a provided route over a metalled road to reach the shed in a dockyard. As this was a longway round, workmen in the dockyard generally used to take a shorter cut which involved the crossing of a number of railway lines on the level, to the knowledge and implied permission of the railway company's officials. A dock labourer while using this shorter cut to load cargo into a steamer was knocked down and killed by a light engine. The action was brought for compensation against the railway company.

Held, that the accident arose out of and in the course of the employment as the workman was in the employer's premises proceeding to work over a route which, though it was not a provided route, was still one which was accustomed to be used as a route by the workmen and also permitted impliedly by the company.

ATTORNEY-GENERAL *v.* METROPOLITAN WATER BOARD, 97 L.J.K.B. 214.

Income-tax Act (1918)—*All Schedules Rules* 19 *to* 21—*"Brought into charge"—Meaning of.*

A Water Company showed a loss for a particular year and, consequently, was not assessed to income-tax the next year, as the company was in law liable to be assessed only on the profits of the previous year. But that next year showed a profit of £2,481,085 out of which the company paid £1,668,351 interest payable on water stock and debentures, deducting and retaining the income-tax thereon.

Held, that the company had no right to retain, as against the Crown, the amount retained by it, as it could not be contended that the interest had been paid out of profits or gains "brought into charge to tax" within Rule 19 of the All Schedules Rules of the Income-tax Act, and that, therefore, the Crown was entitled to the amount of tax deducted and retained by the company.

COLESHILL *v.* MANCHESTER CORPORATION, 97 L.J.K.B. 229.

Negligence—Road not being a highway—Trench on the road—Fall into trench—Injuries—Claim for damages.

A trench was made by the Manchester Corporation on an uncompleted road in connection with the development of a building estate. The trench was cut across the roadway to lay an electric main to an electric standard for lighting. No lights were yet installed in the roadway and the trench itself was at night unlighted and unfenced. The land on the south side belonged to Manchester Corporation though not yet built on. It was divided from the road by a two-barred fence. South of this land was a golf-links which had public footpaths across it and was apparently a favourite walk of the neighbours. At some point of the fence one of the top bars had been broken so that by stepping over the broken bar people could get into the field and people walking through this gap towards the golf-links had made a sort of rough footpath. People took this short cut for the golf-links particularly on Sundays and the Corporation even if they were aware of the practice did nothing to stop it. The plaintiff seeing some people taking the short cut, walked down the road after sunset with a companion. He came back from the golf-links along the uncompleted road about 9 o'clock when it was getting dark and fell into the trench and sustained injuries. The plaintiff instituted an action for damages against the Corporation for injuries sustained.

Held, that the plaintiff was a bare licensee and there being no evidence on which a jury could reasonably find that the defendant has exposed the plaintiff to a danger not obvious or not reasonably to be expected in the circumstances the action must fail.

THE JANERA, 97 L.J.P. 58.

Practice—Stay of action—Plaintiff in the action happening to be defendant in an action elsewhere in respect of the same collision..

An action properly brought in England ought not to be stayed solely because the plaintiffs in the action are defendants in proceedings in Egypt relating to the same collision.

JOTTINGS AND CUTTINGS.

Vexatious Litigation under Workmen's Compensation Acts:—It is but seldom that the High Court is moved by the Attorney-General to make an order under section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, a section which reproduces a similar provision in the Vexatious Actions Act of 1896; but the need of such a provision was amply exemplified in the case of *Robert Loftus* (*Times*, 1st instant), in which the Divisional Court made an order directing that no legal proceedings might be instituted in any Court by the respondent without the leave of the High Court or a Judge thereof. There are in every generation a small number of persons whose unreasonable persistence in litigation annoys the Judges and involves a number of innocent people in vexatious waste of time and money; but in general means are found to put a period to their activities without invoking the aid of section 51. In the case of Loftus, the respondent had, after obtaining compensation under the Workmen's Compensation Acts, applied for an increase, but an order was made terminating the compensation on the ground that he had completely recovered from the accident. From 1919 onwards, using the means provided by the Acts, Loftus had made ten successive applications to the County Courts for a lump sum award, his claim increasing from 1,400*l.* in the first place to 304,000*l.* in the latest application in December last. In each case the application had been refused with costs, but none of the costs awarded had in fact been paid. It must be admitted that exceptional facilities are afforded to a certain type of litigant by the Workmen's Compensation Acts "habitually persistently and without reasonable ground" to institute vexatious legal proceedings.—*L. J.*, 1928, p. 371.

Not Quite Forgotten:—It must not be supposed that the judges of fifty years ago, mentioned in this column last week as having passed out of modern memory, are by all forgotten. One, and he by no means old, on seeing the list, said: "What, Honyman? a peculiar fellow; ugly, of large dimensions, married a barmaid; died of Bright's disease; during a game of whist was told by his partner, a much more famous Judge: 'You're baronet, hold up your bloody hand!' Grove? the inventer of Grove's Battery, grandfather of our own Eustace Hill, K.C.: hated draughts; once when on circuit the caretaker of his lodg-

ings raised a commotion about the disappearance of the sheets from his Lordship's bed, and was finally informed by the Judge himself that he had stuffed the sheets up the chimney to stop the draught. Charley Hall? son of Hall, V. C., son of the Prince of Wales; yachtsman, member of the R.Y.C., who, when a silk, turned up in Court in full Cowes kit, afforded his opponent an opportunity of saying that Mr. Grove suggested Margate to all their minds, and obtained from the Bench the desired adjournment. Sir William Bovill, he of the Tichborne Trial; Chief Justice."—and so forth.

Perhaps, after all, it is only the heedless post-war barristers who have forgotten.—*L. J.*, 1928, p. 385.

Lord Birkenhead on Local Bars:—Lord Birkenhead's contribution to the current number of *Graya* is of great interest to the newly-called barrister who is still contemplating his first step in the direction of the Woolsack. Does London or a local Bar afford him the better opportunities? Lord Birkenhead himself found nothing amiss with Liverpool, where he had some local influence and where he prospered so exceedingly that a Judge on circuit, observing the vast proportions of the new town hall, ironically surmised that they were F. E.'s new chambers. In his day there were at Liverpool a collection of juniors in no way inferior to London's best, including Horridge, J., Greer, L.J., Swift, J., Sir Leslie Scott, K. C., Mr. Collingwood Hope, K. C., and fourteen men who were destined to become County Court Judges or Metropolitan Magistrates. At the neighbouring Manchester Bar were a crowd of equally brilliant performers, including the present Lord Chief Justice of England.

Commence, therefore, at one of the several local Bars if you have local influence; but remember that you will have two fences before you; for in the fullness of time you must move to London or decay. To the young man of capacity and industry, but with no influence or friends in a provincial centre, Lord Birkenhead suggests that the best course is to insinuate himself into busy chambers in the Metropolis. This is the conclusion to which, unaided by such high authority, one would fain arrive.—*L. J.*, 1928, p. 385.

The Proper Study of a Lawyer:—In 1828 there were, according to the scholarly computations of Mr. Park, in a moderate law library 2,500,000 points of law. It makes one

shudder to contemplate the increase of the ensuing century; and one turns with infinite relief to the cheerful modern authorities who assure the lazy and the fearful that all law can be reduced to about seven principles, wherefrom the intelligent can arrive at any required point by the application of logic and common sense.

And the complete lawyer must not confine his study to the three million points. He must not be ignorant, said Dr. Cowell, "of either beasts, fowls, creeping things, nor of the trees, from the cedar of Lebanon to the hyssop that springeth out of the wall." And the Mr. Chitty of the period round about 1850 advised the study of anatomy, physiology, pathology, surgery, chemistry, medical jurisprudence, police and mankind. It is no wonder that the modern practitioner has been forced to specialise and to confine his attention, *e.g.*, to Golf, Conveyancing and Mankind.—*L. J.*, 1928, p. 385.

Religion and the State:—The suggestion made by Cardinal Bourne in a sermon at Cambridge last Sunday that the constitutional requirement under which the Sovereign must be a "faithful Protestant" may some day be called in question is, of course, not practical politics, at any rate so long as the Church of England continues to be established and the Sovereign is the lay head of the Church. And with the Revised Prayer Book on the point of coming again before Parliament the present does not seem a very opportune time for suggesting such a change in the settled policy of the country. But it is interesting to recall that the much less important suggestion for a relaxation of the rule as to the Lord Chancellor when made some thirty years ago found little favour. The occasion was the possibility that Lord Russell of Killowen might be barred from the Chancellorship, and in 1895 Mr. Gladstone wrote to him: "I have never got over my wrath at the failure of our effort to repeal the unjust and now ridiculous law which kept the highest office in your profession out of your reach." Since that time the proposal has, we believe, never been revived, but of course it stands on quite a different footing from the faith of the Sovereign, and the opening of the Chancellorship to Roman Catholics probably only awaits the next occasion for it. Protestant Non-conformists appear to be already eligible.—*L. J.*, 1928, p. 392.

The Law of Trusts:—We notice elsewhere the new "Lewin," and it is interesting to recall the attempt that was

made in 1908 to codify the Law of Trusts. It was an influential attempt. The Trusts Bill was introduced by Mr. Athelstan Rendall and it was backed by, among others, "Mr. Cave, Mr. Micklem, Mr. Stewart Smith, Mr. Buckmaster, Mr. Stranger, and Mr. Hills." It was based on the pattern of the Bills of Exchange Act, and other familiar instances of codification, and professed to be "merely a statement in statutory form of the general rules, now only to be extracted from the reported decisions of the Courts and the various statutory enactments by which they have been supplemented or modified." It did not touch the Public Trustee Act, 1906. We believe it made no progress, and, if we remember rightly, it was not viewed with favour by the judges of the Chancery Division. Some thirteen years before—in 1895—Lord Lindley (then Lord Justice) gave interesting evidence on Trusts Administration before the Select Committee whose report resulted in the establishment of the Public Trustee. Lord Lindley was a supporter of elasticity in trusts. "I think," he said, "that the power to commit judicious breaches of trust with the sanction of the Court would be an immense improvement in the Law of Trusts." We have that now in the Trustee Act, 1925. And Lord Lindley prided himself on his share in the case of *Speight* v. *Gaunt*, upheld in the House of Lords, which established the prudence of the reasonable business man as the test for a trustee. Some day, probably, the attempt to codify the Law of Trusts will succeed, but it is a branch of the law which it is eminently desirable to leave open for judicial improvement, if possible; though with Equity settled, as it now is, on as strict lines as Law, little such possibility seems to remain.—*L. J.*, 1928, p. 392.

A Course of Law:—Those who would abstract the maximum of pleasure and profit from the Law Books might as well do it thoroughly and study this branch of learning systematically. The Law is a heady wine (when it is not caviare), and if not consumed methodically may lead to all manner of excesses. Coke (Inst. 1, c. 1, S. 85) thinks the following system is sound:—

Sex horas somno, totidem des legibus aequis.
Quatuor orabis, des epulisque duas,
Quod superest ultro sacris largire Camaenis.

Sir William Jones it was who, making entirely free of this quotation, and leaving an implied and undivided hour to religion, says:—

> Six hours to law, to soothing slumber seven,
> Ten to the world allot, and all to heaven.

My own advice is, partly adopting that of Lord Birkenhead: insinuate yourself into busy chambers in London and play the devil with whatever work you can find both in Chambers and in Court. Dip into the Reports as and when the need arises; convey by unobjectionable means the impression that you are responsible for the busy junior's successes, while he himself, because of his failure to consult you, is to blame for the failures. Despise not the day of small solicitors, remembering that they are stepping-stones. Work, sleep, religion, and the world will then fall naturally into place.—*L. J.*, 1928, p. 406.

Charles, J. and the Crime Passionel:—Although in this country we do not take the Continental view of the *crime passionel*, our law recognises one or two situations in which a man, not in self-defence and without legal document, may kill and do no murder.

Our mode of dealing with crimes committed in circumstances which in France have a recognised name and classification are less obtrusive, but equally effective. Take the case of *Rex* v. *H. J. Edwards*, tried for the manslaughter of Theodore Potter before Charles, J., at Manchester Assizes. The prisoner, while his wife was walking with another woman, saw Potter approach them, pull them apart, and attempt to put an arm round each of them. The prisoner, coming up, struck Potter a blow in the face, not, he said, a severe one, and knocked him down. Potter subsequently died in hospital from a fractured skull. Acting on the instructions of Charles, J., the Jury found Edwards guilty of manslaughter under great provocation; and the judge, thereupon, sentenced him to three days' imprisonment. As he had already been in prison for more than that period awaiting trial, he was immediately discharged. And none can deny that in so doing Charles, J., did justly.—*L. J.*, 1928, p. 407.

The American Peace Proposals:—Sir Austen Chamberlain's statement in the House of Commons on Friday of last week

justifies the forecast we made a fortnight ago. The British Government, he says, warmly welcome the initiative taken by the United States and are hopeful that it will make a real contribution to the peace of the world. Perhaps of even greater importance is the unanimous acceptance by the House of Lords on Tuesday of the Marquis of Reading's motion, that prompt and favourable consideration should be given to the proposals, and "that His Majesty's Government should declare their acceptance of the principles embodied in the proposed treaties." We need not discuss the delay in making a formal reply to the United States. It is significant that the House of Lords declined to accede to Lord Cushendun's suggestion that the motion should be withdrawn. The result of Lord Reading's action is that the country stands committed by the resolution of its most weighty authority in a matter of this kind to the renunciation of war. Whether Sir Austen Chamberlain was right in saying that this country never has treated war as an instrument of policy we gravely doubt, but that is a matter for the historian. Perhaps Prof. Seeley's thesis in "The Expansion of England" was true and all her possessions fell to Great Britain quite undesignedly as ripe fruit falls to the ground. The renunciation of war, as Lord Cecil pointed out, will lead to a revision of International Law so far as it is based on the right of a nation to make war, and it will necessitate the extension of the existing means for the peaceful settlement of international disputes.—*L. J.*, 1928, p. 411.

Testamentary Disposition:—Lord Astor's attempt to introduce into this country the law of *legitim* which prevails generally throughout the civilised world did not meet with the success which it deserved, and it is unfortunate that the Lord Chancellor gave it such an unsympathetic reception that the motion was withdrawn. There is no doubt that the present English system of unqualified freedom of testamentary disposition enables a man to defeat the obligations he enters into by marriage and results in cases of great hardship to wives and children. Whether they are few or many does not matter. The law exists for the redress of injustice, and cases of injustice are always in the minority. Society is based on the free recognition of moral obligations. In the relatively few cases where this fails—and where the intervention of the law is appropriate—moral are turned into legal obligations. That should be so with the

family and with testamentary disposition. If Lord Hailsham is doubtful whether the thing can be done and Lord Merrivale thinks it is revolutionary, we can make a suggestion which should appeal at any rate to the latter, for is it not the part of a good judge to amplify his jurisdiction? Let it be enacted, then, that a testator who has not made for his wife and children such provision as under the circumstances is proper be deemed not to have been of sound mind and memory. In the possible event of this sensible proposal being considered impracticable, then this country will have sooner or later to adopt in this respect the policy which the civilised world generally has taken from the Roman Law, just as it has tardily acceded to the rule of legitimation by subsequent marriage.—*L. J.*, 1928, p. 412.

Matrimonial Law : *Kissing and Kicking*:—There have been occasions when an *obiter dictum* has misled simple folk in a matter of law. "The prisoner," said Grantham, J., on one occasion, "was justified in believing that his wife had formed an unholy affection for another man. If he had contented himself with boxing her ears it would only have served her right, for her conduct was enough to drive any man out of his mind." The result of this breezy and misleading observation was said to be a great increase in the "ear-boxing" of wives; and although there was more to be said for the views of Grantham, J., than some of his critics supposed, the right of chastisement had, in fact, died long before, and the "quaint and absurd dicta" on which they were based were, in the words of Lord Halsbury, "incapable of being cited as authorities in this or any civilised country."

Now, as plainly appears from the judicial views in *Meekings v. Meekings* (*Times*, May 4), the time-honoured right of kissing one's wife is hedged about with limitations. Undue violence must not be used; nor may a man lawfully assume that at all times and in all places his wife is willing to be kissed.—*L. J.*, 1928, p. 425.

Dress to be worn by Abvocates in Madras.—The High Court is pleased to direct that, in future, all advocates shall wear black coats, stiff collars and bands and the black gowns prescribed by the University of Madras for Bachelor of Laws when appearing before the Court.—*R.O.C.* 3336-B. 2|28.

Madras High Court Rules, Appellate Side.

Appeal against decisions by single Judge.—The High Court hereby makes the following amendment to the Appellate Side Rules. It shall come into force immediately.

R. '95.—When an appeal against an appellate decree or order has been heard and disposed of by a single Judge, any application for a certificate that the case is a fit one for further appeal to the High Court under clause 15 of the Letters Patent of the High Court shall be made orally and immediately after the judgment has been delivered.

BOOK REVIEWS.

THE LAW RELATING TO MINORS, by Sir Ernest Trevelyan, 6th edition, revised by T. Chatterjee, B.A., Bar.-at-Law. Published by Messrs. Thacker, Spink & Co., Calcutta. Price Rs. 17-8-0.

The late Sir Ernest Trevelyan's Law relating to Minors was looked upon as the authoritative treatise on the Indian Law on the subject. It was a matter of some regret that the last edition was becoming out of date on account of various new enactments and decisions. We may perhaps notice one remarkable feature of Trevelyan's works, *viz.*, that the statements of law made by the author could be taken from the treatises themselves without any verification from the decisions or other authorities noticed by him. Another feature is the lucidity of his statements of law which always tends to clear the legal notions of the reader without in any way confusing him. These characteristics have gone largely to make his work on minors authoritative on the subject. We have no doubt that the present edition which has been brought thoroughly up-to-date by noticing the later statutes and decisions, as popular as the previous editions of the work brought out by the author himself.

HENDERSON ON THE LAW OF SUCCESSION, 5th edition, by Alexander Kinney. Published by Messrs. Thacker, Spink & Co., 1928. Price Rs. 32.

The enactment of the Indian Succession Act (XXXIX of 1925) consolidating the provisions relating to testamentary and

intestate succession scattered in various statutes has necessitated the bringing out of this new edition by Mr. Alexander Kinney, the Administrator-General and Official Trustee of Bengal, who is most competent to write on the subject and who was responsible for the two prior editions. Henderson's Law of Succession has been considered as a leading treatise on that branch of the law and the present edition is naturally more comprehensive than the previous one, as the present Act incorporates a number of other enactments than the Indian Succession Act of 1865. Having regard to the fact that all the provisions of the Act are not applicable to all persons in British India, the author has added a note to each section indicating the class of persons to whom each section applies. The notes under each section have been enlarged considerably and references have been made to the decisions since 1922. The author has also given in the addenda the provisions of the two Acts of 1926 amending the main Act of 1925. There is also a comparative table at the commencement of the work giving the sections of the present Act and those of the previous enactments on the subject. This edition with its enhanced usefulness will, we are sure, be widely appreciated.

PREVENTION OF OFFENCES, by Suresh Chandra Mukerji, Vakil, High Court, Calcutta. Art Press, Calcutta. Price Rs. 12.

This is a commentary mainly of the preventive sections of the Criminal Procedure Code arranged in a logical order. Though the work is not a mere digest of cases, the author has kept in view the needs of a busy practitioner and made it useful to him as a book of ready reference by noticing the decisions. Appendix I to the work gives in *extenso* the other important statutes relating to the prevention of offences. A feature of the work that we should draw attention to, is that the author has canvassed the correctness of the decisions in cases where he considers them open to doubt. Special chapters have been devoted to the general statements of the law without the citation of rulings to make the book useful for students. The author has thus tried his best to make the work helpful to the bench, the bar and the student alike.

INDIAN EVIDENCE ACT, by Tarapada Banerji, Vakil, High Court, Calcutta, 6th edition, by Mr. A. C. Ghose, M.A., B.L.,

Vakil, High Court, Calcutta. Published by M. C. Sarkar & Sons, Calcutta. Price Rs. 9.

This is the sixth edition of a popular commentary on the Indian Evidence Act edited by Mr. Ghose who is well known as the author of many legal publications. The learned editor has justly observed that a correct appreciation of the provisions of the Indian Evidence Act is indispensable for the efficient conduct of trials and a lawyer will not be the worse for perusing frequently the more important sections of the Act. This edition brings up to date the decisions on the Act. We however miss to notice any reference to the Privy Council decision in *Narasingerji Jyanagerji* v. *Panuganti Parthasaradhi Rayanam Garu*,[1] which may have the effect of throwing some doubt on the prior notions on section 92 of the Evidence Act and the effect of the decision in *Balkishen Das* v. *Legge*.[2] The observations of their Lordships of the Privy Council on the statement of the law by Sir John Wallis, C. J., that the law in this country is different from what it is in England, we venture to think, requires careful consideration.

THE PRESIDENCY SMALL CAUSE COURTS ACT, by Dr. M. Krishnamachariar. Published by Messrs. Butterworth & Co., 1928. Price Rs. 6.

This is a commentary on the Presidency Small Cause Courts Act by Dr. M. Krishnamachariar who is already well known as the author of many works on several branches of law, with a foreword from the pen of Mr. Justice Odgers who was, for some years, the Chief Judge of Madras Court of Small Causes. The difficulties which often present themselves to the Judge and the practitioner in the Presidency Court of Small Causes are those relating to the jurisdiction of the court and the author has dealt with them very fully in his commentaries. Some other points of difficulty are those relating to Set Off, Recovery of Immovable Property and Distress. These points are also fully considered. The questions relating to New Trials and Appeals are of great importance in the practice of Small Cause Courts. The learned author has discussed them fully in his work. The

1. (1924) L. R. 51 I.A. 305: I.L.R. 47 Mad. 729: 47 M.L.J. 809 (P.C.).
2. (1899) I.L.R. 22 All. 149.

rules framed under the Act in Calcutta, Madras and Bombay are also appended for reference. There are also references to the provisions of English statutes on analogous point. The decisions have been brought up to date and we have no doubt that the book will be found very useful to practitioners and to judges in the Presidency Courts of Small Causes.

KHAN'S POLICE DIARIES—SUPPLEMENT.

We are glad to acknowledge the receipt of the Supplement to Khan's Police Diaries and Statements conveniently arranged to enable the slips being pasted in their proper places. The Supplement brings the case-law up to April, 1928.

THE
MADRAS LAW JOURNAL.

VOL.] AUGUST, 1928. [LV.

II. THE TRANSFER OF PROPERTY ACT AMENDING BILL—(*Continued*).

MORTGAGES.

The chapter on Mortgages in the Transfer of Property Act of 1882 has not been so exhaustive as a Code ought to be and the law of mortgages as administered by the courts has had to deal with several points on which the Act has been silent. Besides there have been several conflicting decisions on the various sections of the Act. The draft bill claims to have made some far-reaching changes in the law and to provide for several cases not expressly dealt with in the previous Act. We shall now examine the proposed changes clause by clause.

Clause (19) of the bill deals with the definition of the various kinds of mortgages. The class of mortgages known as "mortgages by conditional sale" has been a source of trouble to the courts, as it is oftentimes very difficult to decide whether a transaction is really an out-and-out sale with a clause for repurchase or a mortgage by conditional sale. The new proposal provides that no transaction can be a mortgage by conditional sale unless the whole arrangement embodying the ostensible sale and the usual conditions is embodied in one single document. This is really insufficient to meet the difficulties experienced. Still the governing test will be the intention of the parties. The new statutory proviso is only of a negative character and it does not say that wherever there is only one document evidencing the sale and the condition, the transaction is only a mortgage by conditional sale irrespective of the intention of the parties. The words "and in such a case the transaction shall be deemed to be a mortgage by conditional sale" should be added to the new proviso to really effectuate the change which is contemplated. We would also observe in this connection that the existing period of limitation for redemption of mortgage by

conditional sale is too long and should be reduced to twelve years.

Clause 19 (*c*) proposes to alter the definition of the term "usufructuary mortgage" with a view to get over what is stated to be the anomalous decision of the Madras Full Bench in *Subbamma* v. *Narayya*[1]. The said decision permits a usufructuary mortgagee who has not been given possession of the mortgaged properties to sue for sale and realisation of the money advanced under S. 67 of the Transfer of Property Act. The proposed alteration is, to confine the remedy in such a case to a suit for possession by way of specific performance. We do not see why it should be regarded as unreasonable to permit a suit for sale in such cases. The same remedy may usually be secured by taking care to draft the instrument of mortgage as a combination of simple and usufructuary mortgages. In the circumstances we do not think that the proposed change is called for. The other minor alteration in the definition is unobjectionable and may be accepted.

Clause (19) (*d*) proposes a new definition of the term "anomalous mortgage". While the inclusion of the definition in S. 58 is a logical arrangement there is no reason why the existing class of anomalous mortgages should be enlarged by omitting the combinations of a simple mortgage and an usufructuary mortgage, and a mortgage by conditional sale and an usufructuary mortgage from the exceptions. The new definition unduly enlarges the scope of free contractual terms in respect of such combined mortgage instruments, as they will come under the class of anomalous mortgages wherein the rights and liabilities of the parties will be governed by the *ex facie* terms under S. 98.

Clause (20) is intended to provide that all mortgages, whatever may be the amount of the principal money secured, should be only by registered instrument. This amendment may be well accepted as the policy of compulsory registration of all sales and mortgages is a sound one. But we would suggest that advantage should be taken of the present bill to dispense with the necessity of attestation in the case of mortgage instruments. Apart from the difficulties in connection with the meaning of the term 'attestation' which has necessitated a number of amending bills in recent times, we do not see any reason why

1. (1917) I.L.R. 41 M. 259: 33 M.L.J. 623 (F.B.).

mortgage transactions should be dealt with on a different principle from sales, exchanges and leases.

Clause (22) proposes to amend S. 60 of the Transfer of Property Act by substituting the word 'due' for the word 'payable' in order to make it clear that the right of redemption and foreclosure shall ordinarily be co-extensive. By virtue of a special agreement the mortgagor may have the right to redeem even prior to the due date. This is in accordance with recent pronouncements of the Privy Council and this may be accepted. The other alterations proposed are also unobjectionable.

Clause (23) deals with the doctrine of consolidation of mortgages. The Indian law has already abolished the doctrine to a large extent and the proposed redrafting of S. 61 of the Act carries out the principle further by not allowing consolidation even when the same property or portion of it is mortgaged more than once. This may be accepted especially as the section applies only where there is no contract to the contrary. The words "when the principal money of any two or more of the mortgages has become due" seem, however, to be superfluous.

The amendment proposed in clause (24) is really consequential on the changes proposed in the definition of a usufructuary mortgage.

Clause (25) provides for an obvious omission in the old S. 63 where the rate of interest is not provided for.

Clause (26) introduces a new section 63-A to deal with the respective rights of mortgagor and mortgagee in the case where improvements have been made by the mortgagee. We agree that ordinarily the mortgagor shall be entitled to the improvements on redemption and that he should be made to pay the costs thereof only in the cases provided for by the sub-clause (2) of the proposed section. To this list must also be added the case where the mortgagor expressly or impliedly consents to the proposed improvements being made by the mortgagee. The words "or with the consent express or implied of the mortgagor" should be added after the words "public authority". Again in the enumerated cases there is no reason why the mortgagor should have freedom to contract himself out of the liability to pay the proper cost of the improvements. It will be manifestly unjust to compel the mortgagee to carry out an improvement in compliance with the lawful order of any public servant or public authority and yet allow the mortgagor to escape the obligation to pay for the expense by a contract to that effect. We do not

agree that the right of private contract should be completely preserved. We would suggest that in clause (1) the words "in the absence of a contract to the contrary" and the words "and the mortgagor shall not save only in cases provided for in sub-section (2) be liable to pay the cost thereof" should be omitted, and in clause (2) the words "in the absence of a contract to the contrary" should also be omitted. As the Indian law even on the lines of the proposed amendment will be less generous to mortgagees than recent English decisions we prefer to regulate the rights of the parties in the manner indicated above and to take away the right of parties to reduce the liability by a contract to the contrary.

The proposal to omit the expression "for a term of years" in sections 64, 65 and 71 is obviously a proper one as there is no reason why the principle of the sections should not govern all kinds of leases.

Similarly also clause (28) (*b*) rightly proposes to omit the exemption of a usufructuary mortgage from the scope of clauses (*c*) and (*d*) of section 65 of the Act.

Clause (29) proposes to introduce a new section 65-A permitting the mortgagor while in possession of the mortgaged property to grant a lease which will be binding on the mortgagee. As this is a new power in derogation of the mortgagee's rights a number of restrictions is placed as regards the terms of the lease which is permissible. In this presidency agricultural lands which form the large class of mortgaged property are usually enjoyed by the owners by granting leases. It is, therefore, desirable to recognise a right in the mortgagor who is left in possession of the mortgaged properties, to grant a lease in the usual course of management and in conformity with local usages. The restrictions proposed are generally acceptable, but we think that the proposed sub-clause (*e*) of the second sub-section is likely to create difficulties. As often as not, agricultural lands are let on lease for periods of more than one year, so as to allow some improvements to be made by the cultivating tenant and also in many cases the same is necessary with reference to the nature of the crops. In the case of garden lands and punja cultivation, lease from year to year is oftentimes impracticable and uneconomical. There must, therefore, be greater liberty as to the terms of the lease in such cases and the proposed sub-clause (*e*) is thus likely to defeat the object in view. The language in clause (1) of sub-clause (2) is sufficiently general to safeguard

the rights of the mortgagee. If, however, it is thought desirable to give greater precision, we would suggest that the word "ordinarily" should be inserted in clause (e) and some discretion should be left to courts of law with respect to the matter. The liberty reserved by sub-section (3) to provide for different arrangements by necessary provisions in the mortgage deed will not be ordinarily effectual as the form of conveyancing in vogue is not likely to be substantially altered. Besides the tenants who take leases may not always be even aware of the facts that the lands have been mortgaged by the landlord.

Clause (30) amends S. 67 of the Act by narrowing down the right of foreclosure in certain kinds of mortgages. We think that a suit for sale should be the only remedy of a mortgagee and that the right to foreclose should be taken away. The proposed amendment, however, does not go to that full length and still allows a foreclosure decree in the case of "mortgage by conditional sale" and in anomalous mortgages where the deed allows the same. It is a proper proposal to take away the right of foreclosure in the case of equitable mortgages by deposit of title-deeds and in the case of English mortgages. This reservation of the right of foreclosure in case of anomalous mortgages also furnishes another reason why the definition of that term in S. 58 should be narrowed down as we have suggested above.

Clause (31) proposes a new section 67-A to compel a mortgagee who holds more than one mortgage executed by the same mortgagor to bring a suit on all his mortgages in certain cases. This is to prevent a sale of mortgaged properties in execution of a decree for sale in respect of one mortgage reserving the rights of the same person as mortgagee under other mortgages in his favour, whether prior or subsequent. We do not think that the proposed section is exhaustive or sufficient to provide for the very many complicated cases that may arise. In the first place the section, as it is now drafted, applies to a case where the same mortgagor has executed more than one mortgage in favour of the same mortgagee though over different properties. There is no reason why when the properties are different, the mortgagee should be compelled to institute one suit on all his mortgages. This course will manifestly lead to various anomalies and unnecessary complications and will, in very many cases, operate to the prejudice of the mortgagor and of other parties who may hold derivative interest in one or other of the sets of mortgaged

properties; secondly, there is no valid reason why a contract to the contrary between the mortgagor and the mortgagee should take away the disability sought to be imposed.

Clause (32) of the bill proposes to recast section 68 of the Act which deals with the right of the mortgagee to bring a suit for the mortgage money. We agree with the minor alterations proposed in the various classes I to IV, which are practically identical with the terms of the old section. Sub-clause (2) is a new provision to compel the mortgagee to exhaust all his available remedies against the mortgaged property before obtaining a decree for money except in cases where he elects to abandon the entire security and extinguishes the mortgage by a registered instrument. This provision which operates to stay all suits and proceedings to obtain a money decree in clauses 1 and 2 of the new section 68 may be accepted with this qualification that the stay of proceedings should be only so far as the relief against the mortgagor is concerned. There is no reason why a decree should not be obtained and allowed to be executed against other persons such as other joint promisors who may have bound themselves personally to pay the debt. In view of O. II, R. 2 of Civil Procedure Code, a single suit may be filed against both and there is no necessity to stay the entire suit.

Clause (33) of the bill deals with the mortgagee's power of private sale without intervention of court. The amendment now proposed to allow the same powers of private sale in the case of English mortgages, whether the mortgage deed confers a power or not, is a proper one and the Trustees and Mortgagee Powers Act, 1860, need no longer be made applicable to English mortgages. The consequential changes proposed may be accepted. We should, however, think that a power of private sale may be conferred statutorily without reference to agreement of parties to be provided for in the mortgage deed in the following two cases (1) where the mortgagee is the Secretary of State for India in Council holding a first mortgage, and (2) where the mortgaged property or part thereof is situated on the date of mortgage within the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, in so far as the properties in such towns are concerned and where the mortgagee holds a first mortgage over such properties. The case of private sales by second and later mortgagees of the mortgaged properties is likely to lead to such complications as regards the rights of the prior mortgagee and various purchasers that we think it better not to allow such rights in those cases. We think with

the safeguards mentioned above the first mortgagees of properties in the selected towns can be given the statutory power of private sale as far as the town properties are concerned. The conferring of such statutory power and the omission of the present rule which requires such power to be expressly conferred by the mortgage deed will incidentally remove the existing anomaly of insisting on the power being conferred at the time of the first execution of the mortgage deed. There is no valid reason why a subsequent agreement conferring such a power should not be recognised. Secondly, in the case of equitable mortgages created by mere deposit of title-deeds of properties in the towns mentioned above, the existing provision will deny the right of private sale where there is no registered instrument of mortgage created. There is no justification for making a distinction between the two classes of cases, whether there is a deed creating the mortgage or whether there is a mere deposit of title-deeds without a registered instrument. In view of the extended powers we have suggested, we will omit all references to the Governor-General's power to enlarge the selected list of towns or area by notification.

Clause (34) proposes to introduce a new section allowing for the appointment of a receiver in cases where the right to exercise the power of private sale has arisen. We think such a power is unnecessary and likely to be oppressive under the conditions prevailing in the country. The analogy of the English law in this particular is not a safe one to be followed. Nor has any necessity been felt or expressed for such powers. We would suggest that the entire clause should be omitted.

Clause (36) proposes to allow to all mortgagees the rights now conferred on mortgagees in possession of mortgaged property in the cases referred to in sub-clauses (*b*), (*c*) and (*d*) of S. 72. This should be accepted as there is no reason why such rights should not be given to all mortgagees. The proposed amendment, sub-clause (*iv*) is unnecessary and should be omitted. In the proviso to be added, the words "after notice in writing to the mortgagor by the mortgagee" may advantageously be added after the words "has failed".

Clause (37) of the bill recasts the language of S. 73 of the Act. The inclusion of the words "other changes of a public nature" may be accepted, but the substitution of the words "shall be entitled to claim payment" out of any surplus for the words "has a charge on the surplus if any" is likely to affect

the period of limitation for enforcing the claim. This aspect of the matter does not seem to have been borne in mind. The addition of a new clause dealing with the case of compulsory acquisition of mortgaged property may be accepted with similar reservation as to the language used so as not to reduce the period of limitation. The option to the mortgagee to enforce the claim irrespective of the due date is also a change that is unobjectionable.

Clause (38) proposes to omit S. 74 and S. 75 of the Act in view of the new sections proposed to be introduced dealing with the right of subrogation.

Clause (39) proposes some minor alteration in S. 76 of the Act dealing with the rights and liabilities of a mortgagee who takes possession of the mortgaged property during the continuance of the mortgage. We agree that the alterations proposed are sound in principle.

Clause (40) proposes to repeal S. 80 of the Act which abolishes "tacking," but clause (46) introduces the identical section as section 93. This course is unnecessary and S. 80 of the Act can very properly retain its present position having regard to the matters dealt with by Ss. 78 and 79 of the Act.

Clause (41) proposes to widen the rule as to the right of marshalling by making the right available whether there is notice or not of the prior mortgage and enabling all subsequent mortgagees to claim the right and by making the section apply to cases where there are more than two properties mortgaged. All these amendments are based on sound principles and may be accepted.

Clause (42) proposes to widen the rule as to contribution by making it applicable to cases where the mortgaged property is subsequently divided into distinct and separate portions. the liability of the co-sharers being distinct and several. It is also proposed to make the value of the properties as on the date of the mortgage the basis of the calculation as to the rate of contribution. These amendments are proper and unobjectionable.

The alterations proposed by clause (43) of the bill in S. 84 dealing with the summary procedure for redemption by a mortgagor by deposit of the mortgage money into Court to the account of the mortgagee may also be accepted as they tend to remove any doubts as to the legality of the present practice. The provision for restoration of possession by the mortgagee who is in

possession of the mortgaged property is also a useful and desirable one.

Clause (44) proposes to make some alterations in the language of section 84 to make it clearer. The main amendment that is proposed is to provide for the continuance of interest where the mortgagor withdraws the whole or part of the mortgage money which he has deposited in Court without a previous tender. We agree that this is a reasonable provision and the new proviso may be accepted.

Clause (45) proposes to omit sub-clauses (*g*), (*e*) and (*f*) of S. 91 of the Act. The omission of "an attaching creditor" from the scope of S. 91 will make it unnecessary to implead him as a party to a mortgage suit, a question on which there has been some difference of opinion.

Clause (46) provides for a new section dealing with the right of subrogation. The main rules of the law of subrogation are recognised in the section. The provision for registered instrument evidencing an agreement in writing in the case of a creditor who lends money to a mortgagor from out of which a prior mortgage is redeemed is a desirable one and will avoid doubtful questions of intention in such cases. The section cannot be regarded as providing for all cases, but this is not possible or desirable.

Clause (46) also provides for the rights of mesne mortgagees. As O. 34, R. 11, Civil Procedure Code, is proposed to be omitted along with S. 74 and S. 75 of the Act, the new Ss. 92 and 94 as drafted by the said clause deal completely with the matters governed by the repealed sections and rules. This clause may be accepted as it stands.

Clause (47) deals with the right of a co-mortgagor who redeems the entire mortgage. Under the proposed new S. 92, he will have a right of subrogation and this clause allows him to add the proportionate costs to the share of the mortgage money due to him in enforcing his right. The reference in the old section to the necessity of "obtaining possession" is rightly done away with as the rule should obviously be applicable to all mortgages, whether usufructuary or otherwise.

Clause (49) proposes to alter the language of S. 100 of the Act to make it clear that the charge-holder has the same rights as far as the case may be as a simple mortgagee. It also expressly provides that a charge as such cannot be enforced

against the property in the hands of the transferee for consideration without notice. These amendments are quite proper.

Clause (50) proposes to entirely recast the language of S. 101 of the Act. The existing section makes the question of merger or no merger dependent upon the intention of the parties and in general the presumption is in favour of keeping the mortgage alive. The proposed alteration is on the lines of declaring statutorily that there is no merger of interests as against the subsequent encumbrancers irrespective of any question of proving an intention to keep alive the prior mortgage. We think this may be accepted.

Clauses (51) and (52) propose some minor alterations which are unobjectionable.

S. P.

SUMMARY OF ENGLISH CASES.

DUCKER *v.* REES ROTURBO DEVELOPMENT SYNDICATE, (1928) A.C. 132 : 97 L.J. (H.L.) K.B. 317.

Income-tax—Sale of patent rights—Sale proceeds if represent profits or capital asset—Liability to assessment—Income-tax Act, 1918, *Sch. D.*

The respondent company was formed for the special purpose of acquiring rights in regard to a particular invention that had relation to centrifugal turbine pumps. By an article of the Memorandum of Association, the company was authorised to sell and grant rights and privileges in respect of all or any part of the property and rights of the company. The special purpose of the company was carried out by acquiring two-thirds of patent rights and reserving one-third to the inventor. Subsequently the company acquired further English and foreign patents in connection with the invention. The respondent company and the inventor granted to an American company a license to manufacture under a United States patent with an ultimate right of acquiring the whole patent by purchase. Subsequently the United States patent was sold and the sum representing the sale proceeds was assessed to tax by the Special Commissioners on the ground that the sum was a gain made in an operation of business in carrying out a scheme for profit-making and not capital asset.

Held, that the Special Commissioners had adopted the right test in assessing that sum and that there was abundant evidence upon which their conclusion of fact could be supported.

HONGKONG AND SHANGHAI BANKING CORPORATION *v.* LO LEE SHI, (1928) A.C. 181: 97 L.J. (P.C.) 35.

Bank-note—Accidental mutilation—Fragments recovered and not identified—Absence of the number of note—Liability of the Bank—Bills of Exchange Act, 1882, *S.* 64.

The appellant Bank issued a bank-note for £500 payable to bearer on demand. The respondent obtained this note from her husband. She placed it in the pocket of some garment and having forgotten she had placed it there, she washed, dried and starched the garment and was proceeding to iron it when she felt the remains of the note. From the fragments of the note a considerable portion of the note was replaced and its most critical characteristics were made plain. But the number of the note could not be recovered. When the respondent presented the note to the Bank for payment, the Bank refused payment.

Held, that the identity of the note as a Bank-note was sufficiently established as it contained all the necessary elements that would render it valid and effectual as a negotiable instrument. As the number of the note was not included in the operative part of the note, the contract had never been altered, and the Bank would be liable on the note.

Held, also, that the Bills of Exchange Act, 1882, S. 64 did not apply to an alteration accidentally made in a bill.

REX *v.* O'DONOGHUE, 97 L.J.K.B. 303.

Criminal Law—Murder of a child one month old by the mother—'Newly born'—Meaning of—Infanticide Act, 1922.

The accused gave birth to an illegitimate child. After the child had lived over a calendar month, the accused murdered it and made a confession to the Court.

Held, that the accused could not be found guilty of infanticide as a child one month old was not 'newly born' within the meaning of the Infanticide Act, 1922.

In re REEVES : REEVES *v.* PAWSON, (1928) 1 Ch. 351.

Will—Construction—Bequest of "my present lease"—Subsequent renewal of the lease by the testator—Codicil confirming the will in all respects—Wills Act (1837), *S.* 24.

During the currency of a lease, the lessee bequeathed to his daughter "all my interest in my present lease of No. 1 Chesterfield Street". The testator subsequently obtained a renewal of the above lease and at a later date having added a codicil to his will, confirmed his will in all other respects.

Held, that the benefit of the renewed lease passed to the testator's daughter under the provisions of the will. The use of the words in the codicil "in all other respects I confirm my said will" would have the effect of bringing down the date of the will to the date of the codicil and making the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date.

M. *v.* M., (1928) P. 123.

Judicial separation—Alimony pendente lite—*Wife when entitled after the decree.*

A wife who has obtained a decree of judicial separation is not entitled to an allotment of alimony *pendente lite* unless she has obtained an order for it before the decree, although she may have commenced proceedings earlier in the suit to obtain it.

GOSSE MILLARD *v.* CANADIAN MERCHANT MARINE, (1928) 1 K.B. 717: 97 L.J. (K.B.) 193 (C.A.).

Shipping—Bill of lading—Cargo damaged during transit—Negligence of the shipowners' servants in leaving the hatches open—Damage by rain—"Act or neglect or default in the management of the ship"—Shipowners not liable—Carriage of Goods by Sea Act, 1924, *Art. IV, R.* 2.

A cargo of tinplates was shipped on board the "Canadian Highlander" by the plaintiffs under a bill of lading.. During the voyage the steamship got into repairs and so was being kept in a dock for repairs. While the repairs were being executed the workmen left open the hatches of the hold in which the tinplates were stored. Consequently rain water penetrated the hold and damaged the tinplates. In an action by the owners of the tinplates in respect of the damage so caused,

Held, that the shipowners were not liable for the damage, as the negligence of the management of hatches was "negligence in the management of ship" within the meaning of Art. IV, R. 2 of the Carriage of Goods by Sea Act, 1924.

In the goods of GATES, (1928) P. 128: 97 L.J. (P.) 76.

Will—Construction—Bequest of "all my money to X"—Estate not wholly disposed of—Right of persons entitled under an intestacy to grant of administration—Probate non-contentious rules, R. 119.

Where a testator died leaving a will by which he bequeathed "all his money to X" and the testator's estate comprised of cash in the house and at the Bank, a mortgage debt, stocks and shares, furniture and an equity of redemption of freehold property,

Held, that the will disposed of all the testator's estate except the equity of redemption of freehold property and the furniture.

Held further, that as the estate was not wholly disposed of by the will, persons entitled under an intestacy could take a grant of administration in priority to legatees or devisees.

PECHERIES OSTENDAISES *v.* MERCHANTS' MARINE INSURANCE CO., (1928) 1 K.B. 750.

Costs—Taxation—Costs incurred before the action and during stay of proceedings—Powers of the Taxing Master to grant.

Per Lord Hanworth, M.R.—"There is power in the Taxing Master to allow costs incurred before action brought, and if the costs are in respect of materials ultimately proving of use and service in the action, the Master has a discretion to allow these costs, which he will probably exercise in favour of the party incurring them, because they have been made use of during the course of the action."

Per Atkin, L.J.—"It is always a question of fact for the Taxing Master whether the costs were or were not reasonably incurred during that period (stay of proceedings), always bearing in mind that there was a stay and also the purpose for which the stay was granted."

In an action on a marine policy the usual order was made for the filing of affidavit of ship's papers and for a stay of proceedings in the meantime.

Held, that this stay did not paralyse the activities of either parties and prevent him preparing his case.

FOREMAN AND ELLAMS, LTD. *v.* BLACKBURN, (1928) 2 K.B. 60.

Sale of goods—C. I. F. Contract—Shipment of goods before contract—Bill of lading issued after goods shipped—Steamer halting at several places in the meantime—Buyer if can refuse to take delivery.

A contract for sale of frozen rabbits was entered into on July 2, 1926 and provided for their shipment from Sydney, C. I. F. Liverpool by a certain steamer to sail in August. The goods were shipped at Sydney in the month of June and the steamer after visiting several ports re-visited Sydney. Finally she sailed for Liverpool on August 17, 1926, when a bill of lading was issued. The buyers refused to take delivery of the goods and the suit was brought for breach of contract.

Held, that the sellers were not entitled to recover damages, inasmuch as they themselves had committed breaches of contract by shipping the goods even before the date of contract of sale and by issuing a bill of lading long after shipment of goods, the steamer having in the meantime visited ports several hundred miles from the port of shipment.

JOTTINGS AND CUTTINGS.

Grievances—Dead and Alive.—Amongst the grievances set down for remedy by the Home Office is the fact that these police magistrates are not entitled to pensions; and that is why the retired magistrate is almost as rare as the deceased animal referred to by Mr. Weller on an historic occasion. Faced with the certain prospect of a penurious retirement, they are forced to struggle on and continue while life and being last.

It is not long since the County Court Judges were in the same unhappy state. It is true that before Lord Loreburn introduced his County Courts Bill in 1908 the Lord Chancellor might, under S. 24 of the County Courts Act, 1888, recommend a County Court Judge for a pension not exceeding £1,000 a year; but his power to do so was limited to the case of a Judge being "afflicted with some permanent infirmity disabling him from the due execution of his office". Little use was accordingly made of the provision, although a great Judge of the time observed (in jest) that most County Court Judges were within its terms from the day of their appointment. Another grievance of the County Court Judge was removed at the same time.

If he were absent from any cause he had to provide and remunerate his own deputy; while his brother of the High Court, with much greater resources, was not and never had been under a corresponding obligation. Now, the deputy County Court Judge is provided at the expense of the State and receives a modest solatium of four pounds—or is it four guineas?—a day for his services.—*L. J., June* 30, 1928, p. 543.

Lord Cottenham's Sixty.—Talking of patronage, never before or since has any Lord Chancellor had a more splendid accession of that commodity than fell to Lord Cottenham on the passing of the County Courts Act, 1846. At one fell swoop he created no less than sixty Judges. Three of them were Serjeants-at-Law, and three were Queen's Counsel; the rest were Stuff-Gownsmen. William Adam Hulton, one of the appointees, continued to sit for forty years and retired in 1886. The County Court Judges, in those coarse and unrefined days, bore no particular style or title. Not until 1884 did the Order in Council appear declaring that they should be "called, known and addressed as 'his honour' prefixed to the word 'Judge,' before their respective names," and should have "rank and precedence next after knights bachelors."—*L. J.*, p. 543.

Sir Edward Clarke.—Sir Edward Clarke, the oldest King's Counsel and the Bar's "Grand Old Man," says *The Daily Telegraph*, came out of his retirement some days ago and for a few hours resumed professional duties.

In 1912, Sir Edward, who is now 87 years of age, was appointed by the Board of Trade to settle disputes under the Coal Mines Minimum Wage Act. This he did for two years, until the war automatically stopped the work. Recently a case arose in Sheffield, and the Board of Trade asked Sir Edward to appoint an arbitrator. Sir Edward declined to do so, saying that he would settle the matter himself.

Packing a suitcase, he travelled up by the night train to Sheffield and returned by the lunch train the following day, having restored peace between masters and employees during the morning.

"In spite of his age he thoroughly enjoyed the little trip," Mr. Percival Clarke, his son, said in an interview.—*L. J.*, p. 548.

Judge and Sexual Crimes.—Mr. Justice Humphreys, says *The Times,* addressing the Grand Jury at the Glamorgan Assizes at Swansea on Monday, said that the number of charges of a sexual character was a blot upon our civilisation. "One could not help thinking," he added, "that it reflects no credit upon the upbringing of those persons, and the opinion I have formed, on reading the depositions—and it is not the first time—is that the girls are just as bad as the boys. It is a very sad thing to find, in what we are pleased to think is a civilised country, that such crimes should be so common, no fewer than one-third of the cases in this calendar being made up of charges of such a character."—*L. J.,* p. 549.

The Crown Proceedings Bill.—The Lord Chief Justice at the Lord Mayor's Banquet abandoned the serious attack on "Administrative Law" which he has recently developed, for pleasantry at the expense of the growing tendency to eliminate the Judges. In the "Isles of the Blest," towards which the confusion of the Executive and Judicial powers is leading us, there is to be a single Act of Parliament of interminable length, and any difficulties are to be solved in the third floor back of a Government office. That is a pleasing after-dinner forecast, but meanwhile the serious resistance to bureaucratic justice goes on. The question of the encroachments of the Government Departments is well discussed in this month's *Fortnightly* by Sir John Marriott, M. P., in his Article on "Law and Liberty." In the main it is a statement of the rejection of Clause 4 of the Rating and Valuation Bill, and it is a protest against the system under which "many modern statutes are mere *cadres*, and afford no adequate indication of their ultimate scope." Delegated legislation has, indeed, largely undermined Parliamentary authority. And there is the letter in Thursday's *Times* from Sir Thomas Hughes, K. C., the Chairman of the Bar Council, and Sir Cecil Coward, the President of the Law Society, urging the introduction of the Crown Proceedings Bill. The letter is written in order to arouse public interest in the Bill, for, except under the pressure of public opinion, there appears to be little chance of its being taken up. Who is at fault we do not know, but it must be presumed that the Government Departments are unwilling to abandon a system of procedure under which the scales of justice are heavily weighted against the subject.—*L. J., July,* 1928, p. 2.

The Earl of Reading.—Mr. Street's "Lord Reading" (Geoffrey Bles, 10*s*. 6*d*.) reveals, so far as a contemporary biography can be expected to do so, the details of one of the most remarkable careers in legal history. Clerk, able seaman, stockbroker, barrister, Lord Chief Justice, Ambassador, Viceroy such was the sequence of posts occupied and adorned by this amazing peer. At the Bar his great gifts as a cross-examiner are still remembered and admired, and in the War troubles his financial genius was of the greatest service to this country. Mr. Street is, however, probably right in laying stress on his peculiar gift of successful compromise as perhaps the main factor in his success. His work in the United States is a fine example of his merit in this kind; but it was post-War India, which taxed his great powers to the uttermost and will prove the most enduring monument of his achievements.

A curious and interesting fact is related by Mr. Street. His progress at the Bar was in the first years so discouraging that he resolved to emigrate to the United States. His wife's persuasion alone induced him to continue; whereby he owes much, and England more, to her courage and her faith.—*L. J.*, p. 14.

Young Folks and Judges on Adultery.—Not once, but many times of late, the prevailing boy and girl artists, playwrights, critics and authors have spoken slightingly and disrespectfully of the antique moral philosophy of our Judges. They have been called old fogies; their views have been comprehensively condemned under the Victorian label; it has been said they are entirely untouched by modern thought and that they have no knowledge of the world.

It is only natural that the Judges who hear and determine divorce and matrimonial causes should come in for the brunt of this fresh young modern assault. The poor President, Hill, J., and the others may hardly utter a single word of reproach against the grossest adulterer but these critics discharge a volley of verbal missiles at their exalted heads. Giving ear to the outcry of these Enfranchised Young People, one might imagine that the Judges led a life secluded and sheltered, almost monastic; and that their absurd views on woman and marriage were discredited and cast out by the best people fully ten years ago.—*L. J.*, p. 33.

What the Judges know.—Their Lordships will probably not demur to the charge that their moral views have not broadened and loosened in conformity with the requirements of their young critics and friends; but there is not a man amongst them who will not stoutly refuse to acknowledge that he is lacking in a knowledge of the world. And, since such a knowledge is oft understood to mask an acquaintance with its more unconventional aspects, the Judge can surely claim to be a great authority, if not the greatest, in the most modern and startling manifestations of the latest life.

Every day it is his duty to insist on hearing an exact account of what actually happened and the very words that were used; words and acts of such detailed realism that no theatre could stage them and no author would dare to set them down; he has to examine not only facts, but motives and results, and to deliver judgments of great moment thereupon. Small wonder that the really up-to-date folk are resorting more and more to the Courts for the Real Thing.

Or look at the Calendar at any Assize. No publisher dare print even the bare description of some of the modern deeds therein recorded. As Dr. Johnson observed, you will find strong facts in the Calendars and the Judge has to know all about them.—*L. J.*, p. 33.

BOOK REVIEWS.

THE TRIAL OF SAMUEL HERBERT DOUGAL. Edited by F. Tennyson Jesse. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

It is almost with a sickening feeling at the inhuman acts of Samuel Herbert Dougal, that we peruse the introduction of this volume, so succinctly and yet so clearly dealing with the facts of the murder of Camille Cecile Holland. Hardly anyone, who closely follows the evidence given for the prosecution, will deem the Counsel for the prosecution, Mr. F. A. Gill, K. C., to have lacked very good materials in order to make his labours considerably easier. On the other hand, we are led to think that Mr. George Elliott gains more our appreciation, even though he has lost his case, for his really able defence which leaves nothing unsuggested in creating doubts as to the proof of the case against the prisoner. But what really strikes us in the end is, that just retribution awaited the man whose

guilt could not escape notice, despite the long time that elapsed between the murder and the investigation of the case. The pathetic end of a lady "under distressing circumstances" would be too distressing to us, but for the sentence of death passed on the murderer, which as much appeals to the reader to be the proper conclusion of it all, as to those who were actually at the trial. This volume is a good addition to the series of the British Notable Trials.—K. C.

ADVOCACY SERIES, VOLS. III AND IV. By P. Ramanatha Aiyar, B.A., B.L., Vakil, Trichinopoly and N. S. Ranganatha Aiyar, B.A., B.L. Price, Vol. III, Rs. 4, Vol. IV, Rs. 3.

The third volume of the series, bearing the title "Cross-examination as to Testified Matters", is an analytical survey of the various matters regarding which witnesses depose during a trial, just as things which they may have heard or seen or felt or smelt and so on. We have only a feeling of extreme relief throughout to find them treated so very methodically, though we are not far from realizing that, with all the fund of information under each chapter, there is hardly anything more noteworthy than an attempt to develop the subject with the help of a plethora of illustrations. The book, as it is, may satisfy the curiosity of the Advocate who has yet to begin his career as a trial lawyer, though it may not enable him to gain hints of the methods of cross-examination. Perhaps, the authors, being alive to the fact, that the excellence in that art pertains more to individual ability or genius, have refrained from dilating upon it.

The next volume "The Art of the Advocate" entertains us much more, since the subject dealt with is one of absorbing interest to every lawyer who wishes to improve his art. It looks a compendium of all the attributes, necessarily to be acquired by the lawyer, in order to succeed in his profession or to distinguish himself at the Bar. The choice illustrations from the advocacy of eminent men like Erskine, Brougham and Choate, and a host of lesser legal luminaries, have only secured for them our keen appreciation, while at the same time evoking our agreeable surprise at the considerable capacity of the authors, to collect these cart-loads of interesting anecdotes from numerous sources. The elaborate treatment of the subject of jury, though it may not prove of immense use to any except an exclusive branch of practitioners, namely criminal

lawyers, since there is not such jury system in our country as in England, it provides the student of psychology a good deal of engaging matter. The book, on the whole, if it is not profound with new suggestions on the art of advocacy, has refreshened a subject, which is of the utmost importance to the lawyer in his daily endeavour to win his case. We do not hesitate to express, that if at all the reader is struck with any-thing in these volumes, it is the unending store of illustrations that almost every page contains.—K. C.

THE LAW OF BENAMI TRANSACTIONS, by Mr. A. Ghosh, B.A., B.L., 2nd edition. 1928. Published by Eastern Law House, Calcutta. Price Rs. 4.

This is the second edition of the law relating to Benami transactions in India from the pen of Mr. Ghosh with whom we are familiar as the author of various legal publications. The system of Benami is very common in India and many of its legal incidents were not clear till recently. The law relating to Benami transactions is not the subject of any enactment though the legislature has made some reference to it in various Acts. The law on the subject has, therefore, been developed by judicial decisions which have not always been uniform. The volume under notice brings the case-law up-to-date and we believe that it will be found useful by the legal profession in this country.

THE CIVIL COURT PRACTICE AND PROCEDURE, by Atul Chandra Ganguli, M.A., B.L., 4th edition. 1928. Published by Eastern Law House, Calcutta. Price Rs. 5.

This is a book which affords a practical guide to lawyers and students of law in all matters of detail relating to practice and procedure under the various enactments which are in daily use and also giving model pleadings and other forms necessary for a beginner. The variety of enactments whose important provisions have been considered may be briefly enumerated to indicate the usefulness of the book. The author has embodied in this edition nearly every amending Act of importance having a bearing on civil procedure. The principles and practice under the Provincial Small Cause Courts Act, Suits Valuation Act, Court Fees and the Stamp Acts of the various Provinces, the Indian Succession Act, the Land Acquisition Act, the Lunacy Act and the Limitation Act as amended up to 1927, with the important rulings under the same, have been given.

THE LAW APPLICABLE TO CHRISTIANS, by Paul Appasamy, M.A., LL.B., Judge, City Civil Court, Madras. Published by the Christian Literature Society for India. 1928.

This is a book dealing with the personal law applicable to Christians in India written in such lucid language as can be intelligible to a lay reader. It is published mainly with a view to satisfy the needs of missionaries who sometimes in remote parts of the country require guidance on the subject without the assistance of any lawyer at hand. Such a book necessarily requires not to be couched in the technical language of the lawyer while at the same time legal ideas have to be expressed with accuracy. This difficult task the author has successfully accomplished in the pages of this book. We wish to draw attention to the various topics considered by the author in this volume. It is divided into three books or parts, the first book which is introductory deals with the Sources of Indian Law, Law and its main divisions and Personal and Territorial Law. The next book, which is perhaps the most important portion, deals with Conversion and its effects, Marriage and its legal consequences, Divorce and other reliefs, Parentage and guardianship, Intestate succession, Wills, The administration of deceased persons' estates, Ecclesiastical personnel and property and other allied subjects. The third book deals with the Law of Status, Transfer of Property, Registration, Criminal law and Arbitration. From the wide range of subjects dealt with, it must be apparent that the object of the author is more to give a general idea of them rather than deal with them in all their fullness. Leading decisions have also been referred to wherever necessary. We have no doubt that the book will be helpful not only to lay readers but to lawyers trying to make an acquaintance with the law relating to Christians.

THE LAW OF SPECIFIC RELIEF IN BRITISH INDIA, by S.M. Lahiri, M.A., B.L., 2nd edition. 1928. Published by Eastern Law House, Calcutta. Price Rs. 6.

This is the second edition of Mr. Lahiri's commentaries on the Specific Relief Act, whose first edition was favourably received by lawyers in this country. The main reason for it is that the author gives not merly a collection of cases under appropriate headings but has considered the leading principles of equity bearing on the subject giving full references to the English and American treatises on the subject and the leading decisions of the English Courts where those principles have been

laid down and developed. The author not content with references to decisions has given his opinion on their soundness, where, according to him, they may be open to question. To point only to one instance of this, we would refer to page 112 of the book, where the author comments adversely upon the decision in *Chidambara Swamigal* v. *Ramakrishna Reddiar*[1] dealing with the question whether an agreement by the guardian of a Hindu minor to sell the latter's property for a necessary purpose can be specifically enforced against the minor. It would interest the author to know that since the decision was given it has been reversed on appeal in *Ramakrishna Reddiar* v. *Kasivasi Chidambara Swamigal*[2] thus justifying the criticism of the learned author. Reference may be made in this connection to *Nageswara Rao* v. *Kotamma*[3] where the view of the author has been upheld following the decision in *Ramakrishna Reddiar* v. *Chidambara Swamigal*.[2] Such criticisms are bound to be helpful and we welcome this publication.

THE CODE OF CIVIL PROCEDURE (ACT V OF 1908), by Mr. R. Satyamurthi Aiyar, M.A., M.L., Advocate, High Court, Madras and Member of the Madras Provincial Judicial Service. 1928. Published by V. S. N. Chari & Co., Nungumbakkam, Madras. Price Rs. 4.

No lawyer can get on in his daily life without a thoroughly up-to-date edition of the Civil Procedure Code. The editor of this publication has brought out the text of the Code in this volume with a copious index. The editor has also given us a comparative table of the sections of the Code of 1882 with the corresponding provisions of the present Code and a list of sections and the rules of the Code which have been amended by the legislature and by the various High Courts under their rule-making power. There are also several appendices giving the report of the Select Committee, Statements of Objects and Reasons, the relevant provisions of the Government of India Act, the Letters Patents of the various High Courts and other allied subjects. Thus we have an up-to-date edition of the Civil Procedure Code with all information on allied topics.

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1. (1924) 47 M.L.J. 683. 2. (1927) 54 M.L.J. 412.
3. (1928) M.W.N. 214.

THE
MADRAS LAW JOURNAL.

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TEMPLE HONOURS—"NO DUTY NO HONOUR".

The right of entry and of worship in a temple is a civil right. In the exercise of that right, particular persons and groups, particular sects and castes, claim various honours and privileges.

One claim of that sort is by the members of a caste as such, to be served the sacred ashes before they are served to the other castes. During recent years, this claim has come into unpleasant prominence by reason of the rivalry between the champions of Vedic hymns and the champions of Tamil hymns. The Brahman worshippers contend that as per long usage they are to receive the sacred ashes as soon as the Vedic chant is over, and before the Tevaram is commenced to be sung; on the other hand, the champions of Tevaram contend that as per Saiva canon and undefiled usage, the sacred ashes are to be distributed only after the Tevaram chant also is over.

Is the question at issue between the rival castes cognizable by the Civil Court? The claim relates to a point of religious etiquette which consists in receiving temple-prasadam in a certain order of precedence; and no question of right to property or to an office is involved. Therefore, the claim is *prima facie* not one of a civil nature (*Vathiar Venkatachariar* v. *Ponnappa Aiyangar*,[1] *Karuppa Goundan* v. *Kolanthayan*,[2] *Subbaraya Mudaliar* v. *Vedantachariar*[3] and *Striman Sadagopa* v. *Kristna Tatachariyar*[4]).

But two broad and brave grounds are urged (by the resources of advocacy) for maintaining that the claim is of a

1. (1918) 7 L.W. 614 at 617.
2. (1883) I.L.R. 7 M. 91
3. (1904) I.L.R. 28 M. 23 at 25: 14 M.L.J. 171.
4. (1863) 1 M. H.C.R. 301 at 307.

civil nature. One ground is that every privilege or honour claimed by a caste is *per se* a claim of civil nature; the other ground is that the precedence in question is incidental to the civil right of worship.

No positive authority could be adduced in support of the first ground, that any and every privilege, precedence, dignity, or honour, claimed by a caste, that is, by persons as members of, or on behalf of, the caste is *per se* and intrinsically a claim of civil right. The proposition is based solely on the implication of a casual passage in *Karuppa Goundan* v. *Kolanthayan*[2] and another casual passage in *Nagiah Bathudu* v. *Muthacharry*.[5]

In *Karuppa Goundan* v. *Kolanthayan*[2] the suit was by a Vellala against certain other Vellalas to establish his right to receive certain offerings or honours before others of the same caste in seven Devastanams, and for an injunction to restrain the defendants from preventing his so receiving them. At page 92 of the judgment the following passage occurs:—

"If this had been a suit for an office, or to establish a right to which the plaintiff was entitled as a citizen, and as a member of the caste to which he belongs, he would, according to the decided cases, have had a right of suit . . . that which the plaintiff seeks is the honour and dignity, which, he says, has been enjoyed by him in succession to his ancestors, of receiving such offerings in the temples in question, and of receiving them before they are offered to any other members of the caste It is really a question of precedence on the occasions on which such offerings are received by the caste The commercial value of the offerings would be the same, if the plaintiff received them after other members of the caste; but he claims the honour of being the first to receive them. It is not a suit for an office or for a money value, but for an honour."

On the above view the High Court confirmed the judgment of the Courts below dismissing the suit on the ground that it was not of a civil nature.

The first sentence in the above extract is interpreted as meaning that that suit would be of a civil nature if only the plaint in the case had claimed that plaintiff was suing as a citizen and as a member of the caste to which he belonged. None of the decided cases generally referred to in that sentence of the judgment supports the above interpretation; apparently they are *Krishnama* v. *Krishnasami*[6] approving *Narasima Charlar* v. *Sri Kristna Tata Chariar*,[7] *Kamalam* v. *Sadagopa Sami*,[8] *Krishnasami*

2 (1883) I.L.R. 7 M. 91 at 92.
5. (1900) 11 M.L.J. 215 at 224.
6. (1879) I.L.R. 2 M. 62: 6 I.A. 120 (P.C).
7. (1871) 6 M. H.C.R. 449.
8. (1878) I.L.R. 1 M. 356.

Tatacharyar v. *Krishnamacharyar*[9] and *Vengamuthu* v. *Pandavesvara Gurukkal*.[10] Of those cases, the last relates to the right of worship of a "citizen and a caste Hindu" *i.e.*, a member of a section of the public, and the other four cases relate to temple offices. The expression "as a citizen, and as a member of the caste" was probably suggested by the language used in *Vengamuthu* v. *Pandavesvara Gurukkal*[10]; it is echoed in *Venkatachalapati* v. *Subbarayadu*[11] and *Gopala Muppanar* v. *Subramania Aiyar*.[12] What was claimed and allowed in *Vengamuthu* v. *Pandavesvara Gurukkal*[10] was a caste Hindu's right of public worship at a mantapam and not a special and exclusive right (see *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]).

The Privy Council case in *Mansur Hasan* v. *Muhammad Zaman*[14] is an instance of a suit brought by plaintiffs as citizens (*i.e.*, as members of the public or the State) to establish their right to conduct a religious procession with its appropriate observances through a public street; all members of the public have equal right in a public street. (*Sadagopa Chariar* v. *Krishnamoorthy Rao*[15]). The Privy Council case in *Sankaralinga Nadan* v. *Rajeswara Dorai*,[16] the Privy Council case in *Saklat* v. *Bella*[17] and *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*[18] commented upon by the Privy Council in the Rangoon case, are instances of suits brought by persons *as members of a caste* to exclude outsiders from temples or shrines; and the cases in *Venkatachalapati* v. *Subbarayadu*[11] and *Gopala Muppanar* v. *Subramania Aiyar*[12] are converse cases of suits brought by excluded persons to vindicate their claim to enter temples or shrines in the exercise of their rights *as members of the caste to which they belonged.* Not the slightest doubt was ever raised as to these suits being suits of a civil nature; that was because, the right of entry and of worship has all along been recognized to be a civil right.

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9. (1882) I.L.R. 5 M. 313 at 314.
10. (1882) I.L.R. 6 M 151 at 153.
11. (1890) I.L.R. 13 M. 293 at 297.
12 (1914) 27 M.L.J. 253 at 262
13. (1916) 31 M.L.J. 758 at 763, 768.
14 (1924) I.L.R. 47 A. 151 · 52 I.A. 61: 48 M.L.J. 23 (P.C).
15 (1907) I.L.R. 30 M. 190: 17 M.L.J. 240 (P.C.).
16. (1908) I.L.R. 31 M. 236: 35 I A. 176: 18 M.L.J. 387 (P.C.).
17. (1925) I.L.R. 3 R. 582: 53 I.A. 42: 49 M.L.J. 821 (P.C).
18. (1883) I.L.R. 7 B. 323.

Anandrav Bhikajiphadke v. *Shankar Daji Charya*[18] is referred to and distinguished in *Nagiah Bathudu* v. *Muthacharry*.[5] The judgment which prevailed in *Nagiah Bathudu* v. *Muthacharry*[5] was that the claim by a worshipper to have the procession of an idol carried along his street is not one cognizable by a civil court. At pages 223 and 224 the following passage occurs:—

"The Bombay High Court has held in *Anandrav Bhikajiphadke* v *Shankar Daji Charya* [(1883) 7 B. 323] that a suit by certain members of a particular caste in which the plaintiffs claimed that the members of their caste, in common with certain other castes, possessed the *exclusive right of entry and worship in the sanctuary* of a temple was within the cognizance of the Civil Courts. The right set up in this case was the exclusive *right of certain castes to worship in the sanctuary of a temple. No question of ritual was involved* The usage upon which the Court adjudicated was an alleged caste usage. In the present case the right set up was not based upon caste usage, and was not relied upon as a caste privilege. It was a right set up by certain individuals which they claimed to enjoy not as members of the caste but as residents in a particular street."

The above passage is too slender and dubious a foundation for the argument that a claim in respect of any and every caste privilege is a claim of civil nature.

The decisions have refused to recognize ceremonial privileges claimed by sects or groups or their leaders in the exercise of the right of worship (*Karuppa Goundan* v. *Kolanthayan*,[2] *Babu Pujari* v. *Thilkra Gurikara*,[19] *Subbaraya Mudaliar* v. *Vedantachariar*[3], *Vathiar Venkatachariar* v. *Ponnappa Aiyangar*[1] and *Narayan Vithe Parab* v. *Krishnaji Sadashiv*[20]). If, as held in *Karuppa Goundan* v. *Kolanthayan*,[2] a person cannot claim to enforce his precedence over other members of his own caste, by parity of reasoning, one caste of the Hindu community cannot claim to enforce its precedence over another caste.

So early as 1863, the Civil Courts were enjoined "to guard carefully against entertaining suits in respect of mere ritual observances and the conduct of the various kinds of religious worship and ceremonies, and of what as incident thereto, may be due to the sacred character or the religious rank and position of individuals." "The duty of individuals to submit to and perform certain religious observances in accordance with the ritual

1. (1918) 7 L.W. 614 at 617.
2. (1883) I.L.R. 7 M. 91.
3. (1904) I.L.R. 28 M. 23 (25): 14 M.L.J. 171.
5. (1900) 11 M.L.J. 215 at 223, 224.
18. (1883) I.L.R. 7 B 323.
19. (1921) M.W.N. 395.
20. (1885) I.L.R. 10 B. 233.

or conventional practice of their race or sect is, *in the absence of express legal recognition and provision*, an imperfect obligation of a moral and not of a civil nature." (*Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13] quoting *Srimati Sadagopa* v. *Kristna Tatachariyar*[4]).

The cases in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar*[21] and *Athan Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar*[22] draw attention (1) to "the growing tendency to bring before civil courts disputes on matters of religion not properly within their province" and (2) to "the legal ingenuity that is continually being exercised in trying to evade the provision in section 9, Civil Procedure Code, by trying to bring sectarian disputes under the wording of the explanation to that section."

Next, as to the second ground that the precedence in question is incidental to the civil right of worship. The argument is put in this way: The claim to the precedence in question is attached and incidental to the right of worship; and as the right of worship is recognized to be a civil right, the claim to the honours attached and incidental thereto is a claim of civil nature cognizable by the Civil Court. The argument is founded on certain general expressions in the judgment of Mr. Justice Krishnan in *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar.*[13]

The actual decision in the case was this. The right of a person exclusively to conduct a Mantapapadi in a temple, bearing all the expenses of the ceremony, and *receiving in return* certain honours and emoluments is a civil right. A suit to establish such right is maintainable in the Civil Courts; as also a suit to enforce the claim for the honours and perquisites appurtenant to the right. (*Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]). The case in *Kadirvelu Chetty* v. *Nanjundaiyar*[23] is on all fours with *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]; it was decided about six months earlier.

Here it may be observed, that the right to perform a Mantapapadi and to receive the honours and emoluments attached thereto, is recognized to be a species of property susceptible of

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4. (1863) 1 M. H.C.R. 301 at 308.
13. (1916) 31 M.L.J. 758 at 761, 762 to 768.
21. (1899) 9 M.L.J. 359
22 (1913) M.W.N. 300.
23. (1916) 3 L.W. 512.

partition among Hindu co-parceners. (*Nagiah Bathudu* v. *Muthacharry*[5] citing *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry*.[24]) In *Thirumalai Alwar Aiyangar v. Lakshmi Sadagopa Aiyangar*[13] that aspect is specifically mentioned in the judgment of Mr. Justice Spencer at page 763; so the claim in question in that case was a claim to property within the meaning of the explanation to section 9, Civil Procedure Code. It may be further observed that Mr. Justice Spencer was inclined to the view that the duty of the Mantapamdar to perform the Mantapapadi was a legal and not merely a moral duty (page 763).

Now as to the judgment of Mr. Justice Krishnan in that case, the learned Judge has used general language which puts on the same footing the case of honours appurtenant to an office and the case of honours appurtenant to a right of worship. A suit to enforce a person's right to an act of worship and to the honours "legally attached" thereto, is said to be a suit of a civil nature, quite as much as a suit to enforce a person's right to an office in a temple and to the honours "legally attached thereto" (page 766).

Says the learned Judge:

"The existence of the office to which the emoluments claimed are said to attach must be proved; and so must the connection between the office and the honours and dignities and perquisites claimed, be established by clear evidence. The right to an act of worship stands on the same footing as a right to an office; a person is entitled to enforce it by suit in the same way; and if any honours or perquisites are attached thereto, it follows that they can also be claimed *under the same conditions as honours attached to religious offices*" (page 767).

The honours in question in *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13] were really appurtenant, and legally attached, to the special and exclusive right of worship claimed by the plaintiff They were due to him *in return and as remuneration for* his services. (31 M.L.J., 762, 763, 765, 767 and 768).

In respect of temple-honours claimed by virtue of an office, the case in *Sri Rungachariar* v. *Rungasami Battachar*[25] lays down that

"Civil Courts have jurisdiction to entertain a suit for honours, if they are claimed as attached inseparably to an office as *part of its emoluments*, and not simply accorded to its holder as marks of respect"

5. (1900) 11 M.L.J. 215 at 222.
13. (1916) 31 M.L.J. 758.
24. (1874) 14 Beng. L.R. 166
25. (1908) I.L.R. 32 M. 291.

In that case the finding was that the privilege of the first "Theertham" was attached to the hereditary office of the plaintiffs (Sthaladars) *as a part of the remuneration of the office.* The office there in question involved secular and religious duties of different kinds, all inseparable from the office, and remunerated in various ways, one of which was by the honour then question. (*Sri Rungachariar* v. *Rungasami Battachar*[25]).

The test propounded by *Sri Rungachariar* v. *Rungasami Battachar*[25] was reiterated in *Atham Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar*[22]; and it is in perfect consonance with the enunciation of the law in the leading case in *Striman Sadagopa* v. *Kristna Tatachariyar.*[4] In that early case, the head of the Ahobala mutt claimed certain conventional dignities and honours in connection with the worship and ceremonials at the Varadarajaswami temple in Conjeeveram. Though a worshipper of high religious rank and sacred position, he held no office in the temple, and was under no legal duty to do any secular or religious service to the temple. The ground of decision is thus stated by Scotland, C. J.:

"The honours and emoluments in question cannot in any respect be considered as remuneration for duties or ministrations performed by the plaintiff in the secular affairs or religious services of the pagoda. They are matters purely of ceremonial observance and devotional display, and are connected with a priestly office, which, as regards the dharmakarthas and worshippers at the pagoda has attached to it no other claim of right than that which rests upon the religious feelings which they, in common, with other Hindu worshippers, entertain for the sacred position of the plaintiff. Being, then, of opinion that the subject-matter of the present suit is purely religious, and relates to the sacred office of the plaintiff, and has no connection with any rights that can properly be considered as being of a civil nature, I think this suit is not cognizable by the Civil Courts."

No honours can be properly said to be "incidental to", or "attached to", or "connected with", an office or a right of worship, unless the honours are by way of return or remuneration for some legal duty of the office-holder or the worshipper. (See *Chunnu Datt Vyas* v. *Babu Nandan,*[26] *Rama* v. *Shivram*[27] citing *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti,*[28] *Narayan*

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4. (1863) 1 M.H.C.R. 301 at 307.
22. (1913) M.W.N. 300 at 303.
25. (1908) I.L.R. 32 M. 291 at 297, 298.
26. (1910) I.L.R. 32 A. 527 at 538, 539.
27. (1882) I.L.R. 6 B. 116 at 121.
28. (1843) 3 M.I.A. 198.

Vithe Parab v. *Krishnaji Sadashiv*[20] citing *Ram* v. *Shivram*.[27]) *In short, the legal principle is No duty no honour.*

The judgment of Mr. Justice Krishnan in *Vathiar Venkatachariar* v. *Ponnappa Aiyangar*[1] was about one and a half years subsequent to his judgment in *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[13]; it re-affirms the view of the law taken in *Striman Sadagopa* v. *Kristna Tatachariyar*[4] and *Sri Rungachariar* v. *Rungasami Battachar*.[25]

The case in *Vathiar Venkatachariar* v. *Ponnappa Aiyangar*[1] related to a suit brought by certain persons known as "Theerthakars" of a temple in the Tinnevelly District. Unlike the Theerthakars in *Sri Rungachariar* v. *Rungasami Battachar*[25] and *Soma Ballachariar* v. *Thiruvenkatachariar*[29] they held no office, and were under no legal duty to the temple. "The evidence in the case established that they have special places allotted to them in the temple to stand and recite, and they are given the honour of Theertham and prasadam before the outsiders get them; and they have what is called an 'Arulapad,' that is, their names are called out by the Archaka in a certain order, when, if present, they have to respond by saying 'Nayinde,' meaning 'I am here'." On that evidence the learned Judge inclined to the view that the plaintiffs were "a recognized and privileged class of worshippers who were shown special consideration by having places allotted to them in the temple, and by being given the honours before the ordinary worshippers in an order of precedence fixed by the usage of the temple."

Yet the claim made by them to exclude from their group a person, who, according to them, had no right to be there, was held to be not triable by the Civil Court. It did not occur to the Bench or to the Bar to suggest that the right of worship was a peg on which the claim to precedence might be hung. Similarly in *Subbaraya Mudaliar* v. *Vedantachariar*[3] the Vadagalai communnity, on whose behalf the suit was brought to establish their claim to recite certain sacred texts in a temple, had an undisputed general right to worship in the temple; but they held no

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1. (1918) 7 L.W. 614 (617).
3. (1904) I.L.R. 28 M. 23: 14 M.L.J. 171.
4. (1863) 1 M.H.C.R. 301.
13. (1916) 31 M.L.J. 758.
20. (1885) I.L.R. 10 B. 233 at 237.
25. (1908) I.L.R. 32 M. 291.
27. (1882) I.L.R. 6 B. 116.
29. (1912) 15 I.C. 409.

particular office in the temple, and the decision was that their claim was outside the province of the Civil Court.

The precedence now in question, if it was accorded to the Brahman community, was due merely to their position in the religious hierarchy (cf. *Sriman Sadagopa* v. *Kristna Tatachariyar*[4]). It was *not* accorded to them in return for any duty or service due and rendered by them to the temple.

The right of worship belonging to the Brahman community is nothing special to them; and it imposes no legal duty on them. They have the right equally and in common with persons of other castes. It is logically impossible that such an equal right of worship could give rise to any ceremonial precedence in favour of one caste over another such as could be enforced in a Court of Law. Claims to precedence and other mere dignities or honours claimed in the exercise of the right of worship are not of a civil nature; the law is clearly stated so in *Nagiah Bathudu* v. *Muthacharry*.[5]

"Temples are intended for all castes; but there are restrictions of entry. Ordinarily, the Brahmans alone would be entitled to access into the inner shrine of the temple." (*Gopala Muppanar* v. *Subramania Aiyar*[12]). The exclusive right of a caste to worship from particular places in the temple may be cognizable by a Civil Court. But the right to worship from particular places in the temple cannot entitle the members of that caste to any honours; for, there is no legal duty or service on their part in return for which the honours can be claimed.

K.C.G.

To

THE EDITOR,

"MADRAS LAW JOURNAL."

THE HINDU WOMEN'S RIGHTS AMENDMENT ACT.

(*Vide* 55 M.L.J., Part 3.)

CROSS NOTES ON CLAUSES.

It is well to remember in general that a codification of a portion of the law is bound to be defective without corresponding changes in the other portions of the uncodified law affected or likely to be affected by it.

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4. (1863) 1 M.H.C.R. 301 (306).
5. (1900) 11 M.L.J. 215 at 226.
12. (1914) 27 M.L.J. 253 (261).

Section 2 contemplates a competition between the adoptive mother and the adopted son only. Section 8 provides that in case of property passing by inheritance or survivorship to a son the widow shall get a share equal to that of the son.

Neither section expressly provides as to the working out of the share of the mother in the case of birth of sons subsequent to adoption. Is it the intention of the framers of the Act to leave the competition between the subsequent natural born sons and the adopted son to be governed by the existing provisions of Hindu Law? Does section 2 abrogate the existing distinctions and give only one-fourth to the adopted son? As it is the share of the mother will have to be worked out after deducting the share of the adopted son. If so it might happen in some cases as for example when there are three subsequent natural born sons, an adopted son, and the widow mother the share of the natural born son will be smaller than that of the adopted son. Is it the intention of the framers? In any event is it not better to standardise the rule equitably by saying that in case of competition between the subsequent natural born sons, an adopted son and the widow mother the natural born son shall take twice or thrice as much as the adopted son and that the widow mother shall rank as or take as much as the natural born son. What about the property of the mother after her death? Is the adopted son to get a share? Or is he not to get at all in the presence of the natural born son? If he is to get is it on the same ratio?

COMPETITION BETWEEN THE WIDOW AND THE DAUGHTER.

The Act as it stands does not give any right of property to the daughter in the absence of her brother so long as the widow is alive. May it not be amended by saying that in the absence of the son the daughter shall take as much as or half as much as the natural born son and the residue shall go to the widow. That will be more in consonance with the spirit of section 4. In this view section 7 will have to be amended. Section 7 (*b*) stops with the daughter. May it not be extended as far as the daughter's son and may not a daughter's daughter be made to rank as a daughter's son especially in view of the new privilege accorded to her in section 12. May not again the daughter in competition with the adopted son be allowed to take as much as the widow mother.

Section 6.—Once the reason of the rule of the exclusion of females from inheritance as Nirindriyas is put aside as not being in consonance with the spirit of the times is there any-

thing on principle to prevent the enlargement of the widow's estate to a full estate. There can be no objection even on grounds of sentiment to the enlargement suggested so far as females born in the family are concerned. The Act lets in a number of female heirs and by giving them a widow's estate lets in a great number of reversioners giving occasion for a number of unhealthy and self-detrimental expedients by the limited owners to bar the reversion and an equal number of reversionary suits. The aforesaid limitation is sure to give rise to more imprudent alienations, doubtful titles and wasteful litigation of little advantage to the limited owner or the reversioner. The present-day litigation with respect to the widow's estate must serve as an eye-opener.

SUCCESSION TO STRIDHANAM.

If there should be no distinction between male and female in the matter of inheritance to the paternal estate it stands to reason that reciprocally the males should be allowed to partake of the Stridhanam property along with females of the same degree of relationship now entitled to inherit. Such a provision should be incorporated in the Act.

Section 11.—Could not the well-meant provisions of the Act with respect to the inheritance of daughters be rendered nugatory in the Mitakshara school of Hindu Law. According to the Act the daughter is entitled to inherit to the paternal estate and under section 11 might enforce her right to partition off her share. But she is not entitled to any interest by birth in the ancestral estate to which her brothers will be entitled. Supposing all the brothers to shut out the sisters alienate their undivided interests while the father is alive, could the daughter prevent it. In that event only the father's share if still undisposed off would be available for partition after the death of the father in which also the brothers would be entitled to share. Under such circumstances the daughters getting half as much as the sons may get next to nothing. The same difficulty may arise in the case of the widow mother also. Some provision should be made to avoid this kind of circumvention of the Act.

R. NARASIMHAIYER.

TUTICORIN,
21st August, 1928.

SUMMARY OF ENGLISH CASES.

In re DUCKER'S TRADE MARK, (1928) 1 Ch. 405.

*Trade mark—Registration of—*Bona fide *intention to use—Meaning of—Trade Marks Act, S. 37:*

Where the owner of certain goods registered the trade mark without any intention of using the mark at the time of the registration but really as a sort of precaution in order that she may have something that may be of some service to her if difficult times should come,

Held, that the mark cannot be said to have been registered with a *bona fide* intention to use it as per section 37 of the Trade Marks Act.

On the construction of section 37 of the Trade Marks Act the intention to use is a present intention to use it.

ROYAL LONDON MUTUAL INSURANCE SOCIETY, LTD. *v.* BARRETT, (1928) 1 Ch. 411: 97 L.J. Ch. 177.

Insurance—Policy of—Stipulation that the policy shall be void if death occurred by suicide—Exception in favour of bona fide *third parties—Money advanced on mortgage by company itself—Right of company to enforce mortgage.*

A life insurance policy issued by a company contained a stipulation that the policy shall be void if death was caused by suicide, but provided that the directors might allow to the policy-holder such part of the sum assured as they thought fit and that the policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration. The life insurance company advanced money to the policy-holder on a mortgage of his leasehold properties and on an assignment of the policy by way of security. The policy-holder committed suicide and the company sought to enforce the security against the leasehold property comprised in the mortgage.

Held, that the expression "third parties" did not include the policy-holder and that the company was entitled to enforce the mortgage of the leasehold property.

In re CHARDON JOHNSTON *v.* DAVIES, (1928) 1 Ch. 464.

Will—Trust to pay income to a Cemetery Company for maintenance of graves—Rule against perpetuities.

A testator directed by his will that he gave to his trustees a sum of £200 "upon trust to invest the same upon any of the investments therein authorised and pay the income thereof to a cemetery company during such period as they shall continue and keep the graves of his great-grandfather and another in the said cemetery in good order and condition with flowers and plants thereon as the same had hitherto been kept by him." The clause further provided that if the graves should not be kept in the order and condition thereinbefore specified the trustees should pay and apply the said income under the subsequent clause in the will relating to the residuary estate of the testator.

Held, that the trust did not offend the rule against inalienability and the rule against perpetuities.

CATTON *v.* ASHWELL AND NESBIT, LTD., (1928) 1 Ch. 484: 97 L.J. Ch. 199.

Workmen's Compensation Act, S. 12—Accident to workman—Voluntary payments of compensation at maximum rate payable in total incapacity—Subsequent application for review by employer on the ground of cessation of incapacity—Stoppage of weekly payments—Action by workman for damages for breach of statutory duty—Maintainability.

The plaintiff who was a fitter in the employment of the defendants, on the 1st August, 1925, suffered personal injury from an accident which entitled him to compensation under the Workmen's Compensation Act then in force, and the defendants paid him compensation at the maximum rate. Before 16th July, 1927, the date of the last weekly payment, the defendants had given notice to the plaintiff that they intended to claim that his incapacities ceased on 30th May, 1927 and that their obligation to pay had then come to an end. On 24th June, 1927 the defendants applied to the County Court for an arbitration by way of review under S. 11 of the Act of 1925 and for an award that since the plaintiff was under no incapacity as from May, 1927 he was no longer entitled to compensation. On 16th July, 1927 the defendants paid into Court, with a denial of liability, the sum of £24 as representing the weekly dues from that date to October 14, the date fixed for the hearing of the application for review. On the 29th October, 1927 the plaintiff commenced this action claiming a declaration that the defendants, having a liability to pay compensation and having paid such compensation until 23rd July, 1927, had since that date committed a breach of their statutory duty in that they ended the weekly

payments otherwise than in pursuance of an agreement or an arbitration, without having brought the case within any of the excepted cases mentioned in section 12 of the Act of 1925.

Held, that the plaintiff had no independent cause of action under section 12 of the Act of 1925 to require his employers to go on making payments to him after the issue as to the continuance of his incapacity has been raised, down to the time when it is determined, even though such *de facto* payments may be recoverable eventually from him by the employers.

Semble: Whether an independent exterior right can be enforced, as by section 21 of the Act of 1925 the question relating to the amount or duration of compensation has to be settled by arbitration.

In re SPENCER AND HAUSER'S CONTRACT, (1928) 1 Ch. 598.

Vendor and purchaser—Auction sale—Statement that vendors were selling as "trustees for sale" under a Will—Will not containing trust for sale—Vendors offering to make a good title by conveying as legal personal representatives of testator—Purchaser if can repudiate contract.

In a sale of a freehold dwelling-house by auction, it was stated that the vendors were selling as "trustees for sale" under the Will of a certain person. The Will, however, did not contain any trust for sale. The auction purchaser stated that he was entitled to repudiate the contract as the vendors had no right to sell the property. The vendors alleged that the statement that they were selling as "trustees for sale" was a mistake and that they can convey the property as the legal personal representatives of the testator and thus convey a valid title to him. The vendors took out an originating summons to have it declared that the objections of the purchaser to the title to the property had been sufficiently answered by the applicants and that a good title to the property had been shown by them as personal representatives of the testator notwithstanding that by error they were stated in the said contract as "trustees for sale" under the Will.

Held, that the erroneous statement did not amount to a warranty by the vendors as to the particular form in which title would be made but it only indicated the method in which the vendors contemplated making a title and that, as the vendors were able to make a good title, though by another method, the purchaser was not entitled to repudiate the contract.

ELLERMAN LINES, LIMITED *v.* READ, (1928) 2 K.B. 144.

Foreign judgment—Jurisdiction of British Court to restrain its enforcement by injunction.

A British Court has no power to grant an injunction restraining a foreign Court from acting. But a British Court can grant an injunction restraining the enforcement of a judgment obtained by a British subject in a foreign Court where it is shown that the British subject obtained the judgment by fraudulently breaking his contract or by fraud, for in granting such an injunction the British Court is not asserting jurisdiction over the foreign Court but only prevents the person, who is in conscience debarred from attempting to enforce a judgment, from enforcing it.

DEE CONSERVANCY BOARD *v.* MCCONNELL, (1928) 2 K.B. 159: 97 L.J.K.B. 487.

Negligence—Sinking of ketch in river due to negligence of owner—Consequent obstruction of navigation of the river—Liability of owner of ketch for damages—Measure of damages.

Due to the negligence of the defendants who were the owners of a ketch, the ketch was sunk in a river and in consequence thereof the navigation of the river was obstructed. The wharf by the side of the river was also obstructed. The defendants abandoned the ketch after its sinking. The Conservator of the river and the owner of the wharf removed the obstruction by spending moneys out of their pocket and brought the present action to recover the amounts spent from the defendants.

Held, that, as the ketch sank due to the negligence of the defendants, they were liable for the damage caused by the obstruction to the navigation of the river and to the approach to the wharf, and the measure of such damages was the reasonable cost of removing the obstruction.

ENGLISH HOP GROWERS, LTD. *v.* DERING, (1928) 2 K.B. 174.

Contract—Society for the sale of hops—Agreement between society and a member thereof that all hops grown on his land should be delivered to the society—Member leasing land to a company—Hops pickable on the land at the commencement of the lease—Right of society to damages—Amount fixed in the agreement as damages—Penalty or liquidated damages.

The defendant was a member of the plaintiff society, the object of which was to organise the marketing of home-grown hops by their sale through them. By an agreement in writing made between the plaintiffs and the defendant, the defendant agreed to deliver to the plaintiffs all hops grown by him during the year 1926 on certain land consisting of 63 acres so that the same might be sold by the plaintiffs.

The agreement further provided that if the defendant should fail to deliver to the plaintiffs any hops produced by him during the year 1926 on the 63 acres or should by himself or an agent or factor or in any way otherwise than through the plaintiffs dispose of those hops, the defendant should pay to the plaintiffs as and for liquidated damages the sum £100 per acre. In July, 1926 the defendant leased to a company for a term of five years the 63 acres. When the lease commenced, the hop vines on the 63 acres had grown to such an extent that the hops were formed and pickable, though unless there was some urgency they would not be picked till some days later. The hops grown on the 63 acres were not delivered to the plaintiffs. The plaintiffs brought the present action to recover £6,300 as damages at £100 per acre, which was the amount fixed in the agreement.

Held, (1) that the defendant had committed a breach of contract by not delivering the hops to the plaintiffs as the defendant had grown or produced a hop crop up to the point when it was pickable though it would be better to wait for a few days;

(2) that the agreement was not in restraints of trade and therefore not unreasonable; and

(3) that the fixing of £100 per acre as damages was not penal but the sum was only liquidated damages.

Per Scrutton, L.J.—It is well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining.

If in a case where breach of a contract may occasion serious damage but damage which is difficult to value exactly, people contracting on equal terms agree beforehand to value or ascertain beforehand a conventional figure which shall represent on an average the probable damage from breaches of the same kind, such damages are not penalty but only liquidated damages.

H. J. GREEN (INSPECTOR OF TAXES) *v.* J. GLIKSTEN & SON, LTD., (1928) 2 K.B. 193: 97 L.J.K.B. 433.

Income-tax—Company carrying on business as timber merchants—Value of timber in Company's accounts—Loss of timber by Fire Insurance against fire—Insurance amount exceeding amount at which timber valued in books—Duty of company to include entire insurance amount in profit and loss account—Income-tax Act, Schedule D, Case 1.

A company carrying on business in timber valued the timber at cost or market value, whichever was the lower, and wrote large sums off the cost price in respect of depreciation in order to arrive at the closing stock values. The reduced sums so arrived at were adopted every year to arrive at the Company's profits for income-tax purposes. The company had insured its stock against loss by fire and for this purpose the stock was valued at replacement value.

Certain quantity of timber belonging to this Company was destroyed by fire, and the Insurance Company paid a large amount in respect of the replacement value. But the estimate at book value of the same was only about a third of this amount. The Company brought this estimate at book value into its accounts as a trading receipt but carried forward the balance of the amount received from the Insurance Company into the balance sheet as a reserve without bringing it into the profit and loss account.

Held, that the entire amount of money received from the Insurance Company must be brought into the profit and loss account as a trading receipt for the purpose of estimating its profits for income-tax purposes.

RECKITT *v.* BARNETT, PEMBROKE AND SLATER, LTD., (1928) 2 K.B. 244: 97 L.J.K.B. 407.

Principal and Agent—Power of attorney—Power to draw cheques—Agent drawing cheque for his private purposes—Payee of cheque when protected.

The plaintiff executed a power of attorney in favour of a person to endorse or sign the plaintiff's name to any cheque. A doubt was raised by the plaintiff's bankers as to whether this power authorised the agent to draw cheques and the plaintiff wrote to them that he wished the power to cover the drawing of cheques drawn upon the bank by the agent "without restriction". The agent drew a cheque upon the plaintiff's bank payable to the defendant in payment of a private debt of his own

and signed it as plaintiff's attorney. The plaintiff, on coming to know of this, brought the present action against the defendants to recover the amount of the cheque as damages for conversion or as money had and received by them to the plaintiff's use.

Held, by the Court of Appeal (Russell, J., dissenting), that the power of attorney must be construed along with the letter written by the plaintiff to his bank and, if it was so read, it had the effect of enabling the bankers and third parties to accept with saftey the cheques drawn by the agent as the plaintiff's attorney, in the absence of any knowledge or notice on the part of the defendants of any irregularity in the transaction.

GARDINER *v.* HEADING, (1928) 2 K.B. 284.

Principal and Agent—Order given by agent—Work done in pursuance of order—Part payment of remuneration—Credit given to principal under mistaken impression—Liability of agent.

The defendant had given the plaintiff an order for some building work for a company of which the defendant was a director. The plaintiff did the work. Not having been paid for it, he went to the office of the company and saw the defendant who asked the plaintiff to meet him the next day as he had another job for him. The plaintiff called subsequently and the defendant gave him the work. Thinking that the work had been ordered on behalf of the company the plaintiff made out estimates as the work proceeded and addressed them to that company. When the work was finished, he was paid a certain amount on the account. When subsequently he tried to get the balance, he was informed by another director of the company that the work had not been ordered for that company but for another company. The plaintiff thereupon brought the present action against the defendant for recovery of the balance. The defendant contended that as while the work was being done, the plaintiff had given credit to the company, he was not personally liable.

Held, that the plaintiff having given credit to the company up to a certain date under a mistaken impression and not having given credit to the defendant before the work was completed, the defendant was personally liable for the balance.

There is no reason why a man who contracts with another, thinking he is an agent, should not sue him when he finds out that he is the real principal, provided the supposed agent has

not expressly contracted as agent so as to exclude his liability as a principal party to that contract.

AUCHTERONI & CO. v. MIDLAND BANK, LTD., (1928) 2 K.B. 294.

Bill of exchange—Sale of goods—Drawing of bill—Acceptance of bill payable at vendee's bank—Loan by bank to acceptor to meet bill—Bill endorsed in blank by payee—Presentation of bill for payment by servant of payee—Payment of bill over counter by acceptor's bank—Conversion of money by payee's servant—Liability of acceptor's bank to payee.

The plaintiffs, a partnership firm carrying on business at Liverpool, sold certain goods to a company which also carried on business at Liverpool and for payment of the goods so supplied the plaintiffs drew upon the company a bill payable three months after date and the company accepted the bill payable at the defendant bank where they kept their account. The company, three days before the bill fell due, notified the defendant bank that they had accepted the bill which had been drawn by the plaintiffs and asked the defendant bank to order payment of the amount and charge to its account. The defendant bank were willing to act upon this advice and to pay the bill. After the bill was due one *W*, who was the plaintiffs' cashier, brought the bill to one of the partners of the plaintiffs' firm and asked to have it endorsed and the partner endorsed it in blank in the usual way. It was then the duty of *W* to take the bill to the plaintiffs' bank and that bank would in the usual course have collected the amount of the bill through the Clearing House and credited to the plaintiffs' account accordingly. Instead of doing this he presented it himself over the counter to the defendant bank, received the money and fraudulently converted and stole it. The plaintiffs then brought this action against the defendant bank, who were the acceptor's bank and not the payee's bank, to recover the amount of the bill. The action was based upon three grounds. The first head of claim was to recover damages for negligence, the second head of claim was for money had and received and the third head of claim was in respect of the conversion of the bill. Evidence was given at the trial that each one of a number of acceptances of which the plaintiffs were holders had been paid by the defendant bank to the plaintiffs' bankers. Evidence was also given with regard to the course of business in Liverpool in connection with the collection of bills which proved a

practically universal custom that trade bills especially for large amounts should be presented to the bank at which they were accepted as being payable through the Clearing House. But the evidence also proved that the presentation of such bills at the counter was not irregular though unusual.

Held, (1) that the first head of claim was ill-founded, as a claim for negligence must be based on the ground of some duty binding the defendants to exercise care on behalf of the plaintiffs, which in the present case could only arise from privity of contract which could not be said to exist between the defendant bank and the plaintiffs;

(2) that the second head of claim was equally baseless, as the drawing of the bill did not amount to an assignment in favour of the payee of funds of the drawee and as in the present case the acceptors had no funds available at the due date but the defendant bank were willing to lend sufficient funds to meet the bill because the amount fell within their authorised limit of overdraft; and

(3) that the defendant bank was not liable for the conversion of the bill as the bill was a negotiable instrument and they dealt with it in good faith and for value in accordance with the law merchant.

A bank is not bound to make enquiries merely because a bill endorsed in blank is presented over a counter. The law merchant has always recognised such presentation as due presentation sufficient to require the bankers, in the absence of very special circumstances of suspicion, to pay.

HARDIE AND LANE, LTD. *v.* CHILTON, (1928) 2 K.B. 306 (C.A.): 97 L.J.K.B. 539.

Trade Union—Infringement of rule by a trader—Association demanding and accepting money payment instead of putting the name of the trader on the "stop list"—Money if can be recovered back.

A rule of a Trade Union framed to prevent traders or agents from selling articles at prices other than those fixed by the association was enforced by putting those contravening it on a "stop list", the effect of which was that no member of the association would supply goods to those infringing the rules. In a particular case the association instead of putting the trader who infringed the rule upon the "stop list" allowed him to escape this by paying a sum of money towards the expenses of the association. The trader brought the present action to recover the

amount paid by him to the association on the ground that the amount was obtained by duress.

Held, that the money paid to the association cannot be said to have been paid under duress and that, therefore, the action must fail.

CONQUER *v.* BOOT, (1928) 2 K.B. 336.

Res judicata—*Breach of contract—Suit for damages—Subsequent suit for damages for breach of the same contract alleging different particulars of damage—Maintainability.*

The defendant agreed to build for the plaintiff a bungalow in a good and workmanlike manner. After the bungalow was erected the plaintiff brought an action against the defendant claiming damages for the breach of the contract, and the particulars of claim stated that the amount was claimed for breach of contract to complete in a good and workmanlike manner and 17 items were set out. The action was decreed. Subsequently the plaintiff brought the present action in the same Court. The claim was identical in its terms with that in the first action, except on the amount of damages claimed and that after the words "in a good and workmanlike manner" the words "and with proper materials" were added. The particulars set out some 14 items differing from those in the former action but of the same character. The defendant set up the defence of *res judicata.*

Held, that the suit was barred by *res judicata* as the cause of action was the same as in the prior action, namely, breach of the contract.

A DEBTOR *In re.* THE PETITIONING CREDITOR *v.* THE DEBTOR, (1928) 97 L.J. Ch. 255.

Bankruptcy Act, S. 5 (3)—*"Sufficient cause"—Two distinct debts—Refusal by creditor of tender of one debt—Object of creditor to maintain total debts above* £50.

Where two distinct debts were owing to a creditor by the debtor and the debtor tendered the amount of one debt but the creditor refused the tender with the object of maintaining his total debt above £50 so as to be able to have the debtor adjudicated bankrupt.

Held, that there was "sufficient cause" for dismissing the creditor's petition for adjudication under S. 5 (3) of the Bankruptcy Act.

MALLETT (INSPECTOR OF TAXES) *v.* STAVELEY COAL AND IRON CO., 97 L.J.K.B. 475.

Income-tax—Capital or income—Surrender of lease by mining company—Amount paid to lessor for surrender—Income-tax Act, Schedule A, No. III, Schedule D, Rule 3.

A company which had a mining lease entered into an agreement with the lessor by which the area subject to the lease was diminished and the lessor accepted a surrender of certain seams of coal comprised in the lease in consideration of a payment of £6,500 by the company to the lessor.

Held, that this sum of £6,500 was paid for the purpose of disposing of a capital asset of the company which had become burdensome to the company and was not a sum wholly and exclusively expended for the purpose of selling the coal in which the company traded and consequently could not be deducted from the company's profits assessable to income-tax.

BROOKE *v.* BOOL, 97 L.J.K.B. 511.

Negligence—Landlord and tenant—Tenant's permission to landlord to visit premises at night—Smell of escaping gas coming from premises—Search by landlord and lodger with naked light—Explosion and consequent damage to tenant's goods—Liability of landlord for damages.

A tenant of a lock-up shop had invited the landlord who occupied adjoining premises communicating internally with the shop to visit the shop at night from time to time to see that everything was secure. One night a lodger of the landlord told him that he could smell an escape of gas in the shop. The landlord accordingly got up and went into the shop accompanied by the lodger. In the shop there was a gas pipe running down from the ceiling, terminating in a gas burner accessible from the floor. The landlord applied a naked light to the lower part of the pipe and found no escape of gas there, and then the lodger got upon to a counter in order to examine the upper part of the pipe. He examined this also with a naked light and an explosion followed resulting in damage to the tenant's goods in the premises. The tenant sued the landlord alleging that the damage was due to his negligence.

Held, that the defendant was liable on three grounds, namely, (1) on the ground of agency, that is to say, that the defendant impliedly invited and instructed the lodger to get upon the counter

and complete the examination; (2) on the ground of control of the proceedings, that is to say, that the lodger was there by the permission and invitation of the defendant and the defendant was in control of the enterprise; and (3) on the ground of a joint enterprise on the part of the defendant and the lodger and that the act which was the immediate cause for the explosion was that joint act done in pursuance of a concerted enterprise.

Held (*per* Talbot, J.) that the defendant was liable on a further ground, namely, that he was bound to have taken proper and reasonable care to avoid damage resulting from the examination of the shop and its contents, having undertaken the examination, and he could not escape liability for the consequences of failure to discharge the duty by getting some one else to make the examination whether that person was an agent or a servant or contractor or a mere voluntary helper.

SIMEONS & CO. *v.* DURAND TRUSTEE, 97 L.J.K.B. 537.

Bankruptcy Act, S. 38—Purchase of goods before date of receiving order—Receipt of delivery orders before bankruptcy—Presentation of delivery order after the date of receiving order—Reputed ownership.

The plaintiffs purchased certain goods from a person by paying for them before the date of the passing of a receiving order made against the vendor on his own petition. Delivery orders were signed by the agent of the vendor and given to the plaintiffs before the date of the receiving order; but the plaintiffs presented them at the wharf, where the goods lay, only after the date of the receiving order.

The wharfinger refused delivery on the instructions of the bankrupt's agent. The plaintiffs thereupon brought an action against the bankrupt's agent. The trustee in bankruptcy claimed the goods as forming part of the bankrupt's estate on the ground that they were in the possession, order, or disposition of the bankrupt at the date of the receiving order.

Held, that the goods could not be said to be in the reputed ownership of the bankrupt so as to form part of the estate of the bankrupt divisible among the creditors under section 38 of the Bankruptcy Act.

JOTTINGS AND CUTTINGS.

Their Knowledge of the World.—There never was a time when the Judges were not shot at for their alleged ignorance

of the current world. It was in Lord Kenyon's time, during a discussion on the "Adultery Prevention Bill," that the Earl of Carlisle made reference to the Chief Justice, saying that : "Like most of his brethren, he was a legal monk, a cloistered gownsman". The observation was well calculated to provoke Lord Kenyon's ire, and it did. "Somebody tells us," said he, "that the Judges are legal monks, knowing nothing of the world! What is the world? It is necessary to define terms, in order to know what the world is, and what is meant by this knowledge of the world. If it is to be got by lounging about Bond Street, like young men of fashion, or at gaming-tables, or at the course of Newmarket, or in private houses of great men, or in brothels, I disavow being acquainted with it; but surely something of what may be truly called a knowledge of the world, *quicquid amant homines,* may be contained in courts of justice".

Of course, different men see different aspects of the world. There is, for example, Lord Buckmaster, who knows what a "pub" is; and Lord Birkenhead, who does not?—*L. J.*, p. 33.

Spiritualism and Fortune-telling.—Of all the forms of prosecution which obsolete laws compel the police to institute, prosecutions for fortune-telling are perhaps the most absurd, and the absurdity is heightened when the prosecution, as in the case of Mrs. Cantlon and Miss Phillimore, decided at the Westminster Police Court by Mr. Oulton on Tuesday, involves inquiry into the veracity of spiritualistic mediums. The magistrate, with the wisdom that marks the Metropolitan Bench, is careful to keep an open mind. He has, he says, lived long enough to know that there are a great many things in the world of which we cannot be certain. It is an old reflection:

"There are more things in Heaven and earth, Horatio,
Than are dreamt of in your philosophy."

And so he does not touch the spiritualism, but when by design—or was it only by chance?—the medium makes a little incursion into the future, it becomes fortune-telling, and is a case, if not for a penalty, yet for payment of costs. It must be sixty years now since Browning castigated Mr. Sludge, "The Medium":

"Sludge begins
At your entreaty with your dearest dead,
The little voice set lisping once again,
The tiny hand made feel for yours once more,
The poor lost image brought back, plain as dreams."

And now we have Sir Oliver Lodge giving evidence that Psychical Research requires the employment of mediums, and Sir Conan Doyle protesting in a letter to Thursday's *Times* against any interference by the law with spiritualism. Possibly, since the crude table-rapping of Mr. Sludge, the cult has advanced in repute, and, at any rate, as Sir Arthur says, all registered spiritualistic churches and all serious societies for the study of psychic matters should be exempt from police prosecution. As to these matters, most people will, like Mr. Oulton, express no opinion. And as to fortune-telling itself, the days when the public required protection against witchcraft and other forms of occult science are gone.—*L.J.*, 1928, p. 58.

Working of the Morality Act.—"An Act to regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals," cited as the Judicial Proceedings (Regulation of Reports) Act, 1926, has now had a fair trial; and events have shown that it suffers from the defects of all statutory moral effort of the like nature. The Bonn case has provided the most modern example of its futility.

The Court was crowded with so much of the general public —largely women of apparent affluence—as could secure admittance; and the trial went on for many days, during which these incorruptible ladies gave ear to such details as no proprietor, editor, master printer or publisher would have published to the crowd outside, in the comparative coldness of print, under pain of (not exceeding) four months' imprisonment or a fine not exceeding five hundred pounds or both such imprisonment or fine. So the large reading public who might be interested in such matters were deprived of news, save only of the fact that the Bonn case was proceeding, while the select hearing public knew all—far more than any newspaper would publish even if the Act had not been passed.

Then came the summing-up of the Judge and his lengthy observations on a "flaming" case; the reading public got that verbatim and their thirst for information was in part assuaged.—*L.J.*, 1928, p. 68.

Prof. Morgan on the Bureaucrats.—We are glad to call attention to two articles on the increasing powers of Bureaucracy which Prof. J. H. Morgan, K. C., has contributed to the *Evening News* (July 26, 27). Prof. Morgan is well known

as a vigilant critic of this development of modern government, and in these articles he marshals the facts with ruthless cogency. In effect, he says, we are now governed, not by Acts of Parliament, but by statutory orders made under provisions which Government Departments have themselves introduced into the Bills they draft, and which are swallowed by an unsuspecting Legislature. In 1920, the number of Acts of Parliament was 67; the number of S.R. & O. made by the Departments was 2,110; in other words, for every statute there were 31 statutory orders; and in 1927, the proportion was the same. Prof. Morgan reminds a wide circle of readers that nearly every statute to-day is "skeleton legislation"; a framework to be filled up as the Department pleases with practically no check from the Legislature. The only check is in the Courts, but with all the activity which the Courts and individual Judges have displayed since Lord Cozens-Hardy called attention to the matter in 1911, this check is useless if the Government draftsman has succeeded in keeping within the statutory powers. Prof. Morgan's articles are, perhaps, the strongest indictment there has been of Departmental methods.—*L.J.*, 1928, p. 76.

The "Fools and Rogues" Bill.—The Companies Bill, after much buffeting and amendment in the House of Commons, reappeared in the House of Lords on Monday, and after a short and facetious commentary by certain of the peers, was safely conducted through its second reading by the Lord Chancellor. So a measure of very great moment, the most effective clauses of which were not secured without a remarkably stubborn and skilful fight by certain legal members of Parliament who are authorities on company law, may be regarded as safe and will forthwith appear on the Statute Book.

"A sort of fools' charter" was how Lord Hunsdon described it; its object was, said he, to protect the fool and punish the rogue, an object which, if successful, would be for the greatest good of the greatest number. More truly did Lord Hailsham describe it, "not as a fools' charter, but a measure to prevent rogues from swindling the unwary public. An urgent measure also, which provided an opportunity of preventing those frauds which were swindling and depriving of their means and driving to ruin a great many people who could not afford to have their savings swept away."

It will be a great act, indeed, which will make our company law really fool-proof and rogue-proof; while the "unwary public"

continue to love a gamble and the company promoters are anxious to meet the demand. Perhaps, in the last resort, it will be found expedient to recognise the fact and to regulate the follies of the fortune-hunters when it is found impossible to cure them.—*L.J.*, 1928, p. 84.

A Great Moslem Jurist.—The career of Mr. Ameer Ali, who died on the 3rd instant, is a striking illustration of the diverse experience which the members of the Judicial Committee bring to the solution of the problems with which it deals. Graduating at the Hooghly College, Calcutta, in 1867, Mr. Ameer Ali came to London with a State scholarship, and was called to the Bar at the Inner Temple in 1873. From that date onwards he was equally busy in professional practice at the Calcutta Bar—soon followed by magisterial functions—and in literary work dealing with Mahomedanism on its historical and its legal sides. In 1884 he became Tagore Professor in Law at Calcutta University, and in 1890 he was appointed a Judge of the Bengal High Court, the first Muhammadan to attain to that rank. He retired in 1904, and coming to this country he was in 1909 appointed to be a member of the Judicial Committee where he was joined afterwards by Lord Sinha, and Mr. Ameer Ali contributed his full share to the work of the Committee. Under the existing arrangements as to appeals from the Dominions, that work consists mainly of Indian appeals, and the Committee has been fortunate in having these eminent Indian jurists associated with it. And though a consistent adherent of Islamism, Mr. Ameer Ali was equally strong in his advocacy of Anglo-Islamic friendship.—*L.J.*, 1928, p. 89.

Fortune-telling Law.—The course and ending of the recent Police Court case in which the leading spiritualists figured so prominently is generally regarded as unsatisfactory; not because of any impropriety in the mode in which it was brought and conducted, but because these fortune-telling enactments, like those relating to witchcraft and other crimes of mediæval gravity, are now obsolete and absurd, and Sir Arthur Conan Doyle and Mr. E. P. Hewitt, K. C., join in the expression of what must be regarded as a general consensus of enlightened opinion, that the fortune-telling provisions of the Vagrancy Act of 1824 should be repealed. "The cause," says Mr. Hewitt, "waste of time and energy on the part of the police and magistrates, and lead to grave injustice to individuals."

The truth is that whether spiritualism is right or wrong, these prosecutions savour too much of religious persecution; and wise magistrates, as in the most recent case, while feeling themselves bound by the Act to convict, are in justice forced so to mitigate the penalty that the survival of the offence itself becomes absurd and ridiculous.—*L.J.*, 1928, p. 97.

Lord Mansfield's Method and Lord Campbell's Rebuke.—Lord Mansfield, C. J., on a similar occasion, when the penal laws against Roman Catholics had outstayed their welcome in English Law, set a valuable precedent for future generations of Judges when he was called upon to try a Roman Catholic priest for the criminal offence of saying Mass. First, he told the jury, the accused must be proved to be a priest, for unless he were a priest, the saying of Mass was no offence; secondly, it must be proved that he had said Mass. But the fact that he had celebrated Mass was not conclusive evidence that he was a priest, nor was the fact that he was a priest proof that the service in question was Mass. A verdict of "Not guilty" was the result.

Lord Campbell, C. J., a zealous Protestant, expressed his strong dislike of Lord Mansfield's method in this case, and considered it to be quite unjustifiable. In the learned biographer's view he should have applied the law strictly, so that, its injustice being made manifest, it might the more speedily have been repealed. No doubt Lord Campbell's would have been the more heroic method; but it would have been hard on the poor priest. And in England it is quite usual to allow institutions, like the stocks as a form of punishment, to rot from misuse rather than thow them into the legislative bonfire.—*L.J.*, 1928, p. 97.

The Old Witch and the Modern Medium.—Mr. John Marshall Gest, of Philadelphia, Penn., published in 1913 a very interesting volume called "The Lawyer in Literature," and in that book a remarkable chapter showing the influence of biblical texts upon English Law. There can be no doubt that our fortune-telling Vagrancy Act is not unrelated to those statutes of Henry VIII and Elizabeth which made witchcraft a frightful offence. "Thou shalt not suffer a witch to live" (Exodus 22, 18) is the Old Testament command, and sorcerers, charmers and consulters with familiar spirits are included in Deuteronomy 18, 9. Saul banished the wizards and the mediums, yet he had a seance,

says Mr. Gest, with the prophet Samuel, with the witch of Endor as medium. "And the command to kill witches," he says, "was transplanted to England after an interval of over two thousand years," as though the mandatory injunction were intended to apply everywhere and for all time, and formed the basis of those statutes of Henry and Eliza which tortured and destroyed so many wretched old Englishwomen, and were not repealed until the year 1736.

And now we are at it again! In vain did the spiritualists disclaim any interest in fortune-telling, and lay stress only on spiritual communion. The average citizen, like Saul and Macbeth, has little use for unforetelling spirits.—*L.J.*, 1928, p. 97.

The Brighton Reprieve.—The Home Secretary at the last moment has advised a reprieve in the case of the three men, Taylor, Weaver and Donovan, who were convicted at the last Sussex Assizes before Mr. Justice Avory of the murder of Mr. F. E. Smith, who died on May 18 as the result of injuries received on April 14. Mr. Justice Avory, it is needless to say, is a very experienced and careful judge. He gave the jury the chance of returning a verdict of manslaughter which they declined to take; though, of course, this is irrelevant if the men were in fact not guilty at all. The appeals of the men were dismissed by the Court of Criminal Appeal, Lord Hewart agreeing that the evidence was circumstantial, but observing that it was not on that account less convincing. The result was considered by the Home Office, and so recently as Monday it was announced that the sentence would not be interfered with. The men were to have been executed on Wednesday. Sir William Joynson-Hicks returned to London on Tuesday to give further consideration to the case, and on Tuesday evening an announcement was issued from the Home Office that, after the most anxious review of all the circumstances, the Home Secretary had decided to rescind his previous decision, and had advised the commutation of the sentence of death in the case of each prisoner to one of penal servitude for life.—*L.J.*, 1928, p. 104.

The Effect of the Reprieve.—The Home Secretary issued on Wednesday a statement explaining this sudden change in which he points out that "his recommendation for the exercise of the Royal prerogative does not cast any reflection upon the justice of the jury's verdict or the decision of the Court of Criminal

Appeal. But he has felt just that element of doubt in this case which, in his opinion, makes it undesirable that the irrevocable penalty should be inflicted." We are not in a position to review the evidence given at the trial, nor do we know what further information has been received by the Home Secretary. But obviously this incident, following so closely on the reversal after 20 years of the conviction of Oscar Slater—now recompensed in accordance with the view we expressed with a gratuity of 6,000*l.*—will make it increasingly difficult to inflict the death penalty. Whatever justification there may be for that penalty, it is open to the fundamental objection that it allows for no possibility of mistake, although it is well known that mistakes do occur. We have quoted before, and we quote again, Lord Shaw's words in commenting on a case of what he describes as "judicial murder." "Every human judgment is mingled with human error, and in the issues of life and death no judge should be charged with an irrevocable doom." Sir William Joynson-Hicks has, notwithstanding the proceedings at the Assizes and before the Court of Criminal Appeal, felt the scintilla of doubt which made the triple execution impossible. We are glad of the result, and we admire his courage in not abstaining from reversing his own decision so recently given. But a penalty which depends so clearly on the Home Secretary for the time being having a mind capable of doubt becomes itself the subject of increasing doubt.—*L.J.*, 1928, p. 104.

Oscar Slater.—The Lords Commissioners of his Majesty's Treasury have assented, on the recommendation of Sir John Gilmour, Secretary of State for Scotland, to a payment of 6.000*l.* being made to Mr. Oscar Slater as compensation for his wrongful conviction in May, 1909, for the murder of Miss Gilchrist in Glasgow, and the imprisonment which he suffered. The offer has been accepted.

In a letter, dated August 4, addressed by Sir John Lamb, Permanent Under-Secretary of State for Scotland, to Mr. Slater, it is said:—

The Secretary of State is accordingly prepared to arrange for an order on his Majesty's Paymaster-General for 6,000*l.* to be sent to you at any address which you may intimate to this office.

Alternatively he is prepared to arrange for the sum of 6,000*l.* to be placed to the credit of your account at any bank which you may specify.

He would be glad to be informed of your wishes in this connection.

The following reply was sent to the Scottish Office:—

146, Holland Street,
Glasgow.
August 7, 1928.

SIR,—I duly received your letter of the 4th instant. I desire that you will place to my credit at the British Linen Bank, St. George's Cross Branch, Glasgow, the sum of 6,000*l.* which the Lords Commissioners of His Majesty's Treasury have agreed should be paid to me *ex gratia* for my wrongful conviction in May, 1909, and subsequent imprisonment.

I am, Sir, your most obedient servant,

OSCAR SLATER.

—*L.J.*, 1928, p. 115.

Automatic Control for Motors.—We print elsewhere letters criticising our recent remarks as to the necessity of curbing the excesses of motorists, and particularly of motor-cyclists. But on these matters we are impervious to criticism, and though opinions may differ as to the exact steps to be taken, the spate of letters in *The Times* recently shows the general agreement that the present scandalous state of affairs must be stopped. Lord Cecil has repeated in one of these letters the suggestion he made in the House of Lords on July 10 that motor vehicles should be subject to an automatic limit of speed. When that suggestion was made to the Motor Vehicles Committee, it was rejected as impracticable, but that, of course, does not dispose of it. If sufficient pressure was put upon the manufacturers, they would soon discover a way of making it impracticable for any machine to exceed the legal speed limit. We may apply Dr. Johnson's "immortal words," as they have been called: "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." And it would concentrate the minds of the motor manufacturers wonderfully if they knew that there was a fine of 50*l.* a day for every machine sent out without an automatic speed control, and in the case of motor cycles, an automatic silencer.—*L.J.*, 1928, p. 118.

The Present Remedies.—That, however, is for the future. It will require legislation, and, meanwhile, the present anarchy

of the roads has to be stopped under the existing law. The terms of that law are well known, and we have never understood how motorists can alter the law by breaking it. We know that there is such a thing as popular nullification of a law. John Hampden, it has been said, set the example by not paying ship money. That was on a great constitutional issue. Many motorists want to nullify the law for their private pleasure or business at the expense of the safety of the public. Whether the law should be altered by Parliament is another matter. It may be that for ordinary motor cars a speed up to thirty miles an hour might be allowed in the open country, though not beyond ten miles in towns and villages and their neighbourhood. And when Parliament intends that any such change should be made, it will make it. Although at present it has authorised the Railways to engage in road transport, yet it has not authorised the carrying on of road transport as if the roads were railway tracks. There are difficulties, no doubt. One is that, as Lord Justice Scrutton said in *Gowar* v. *Hales* [(1928) 1 K.B. 197] it is very difficult to get a criminal conviction against a motorist from a jury. That is because wrong ideas are current as to criminal negligence, and hence many bad cases of manslaughter and personal injury go unpunished. But if the authorities will concentrate on the prevention of speed and noise, the present troubles will be abated. Of course, directors of motor omnibus and coach companies who draw up schedules involving the exceeding of the speed limit should be heavily penalised.—*L.J.*, 1928, p. 118.

The Signing of the Pact.—The Peace Pact, which is the result of M. Briand's proposal to the United States of last December, was signed on Monday of this week. We give the text of it on another page. M. Briand's proposal was for a bilateral Treaty between France and the United States for the renunciation of war as an instrument of policy, and also for the settlement of all questions in dispute between the two nations by pacific means. But Mr. Kellogg, the United States Secretary of State, prompted by influential advocates in his own country of the suppression of war, turned this proposal to a wider use. If between two States, why not between all? And hence the American draft of a multilateral Treaty which was Mr. Kellogg's reply. Since the beginning of the year that draft has been under the consideration of the leading States of the world, and now the Pact has been signed in the terms,

save for an alteration in the Preamble, of the original draft. Attempts were made to alter or qualify it, but these were met on Mr. Kellogg's part with a quiet persistence in his own proposal, based, as he knew, on what the feelings of all peoples and the necessities of civilisation demanded. The States whose representatives signed the Pact on Monday included the United States, Great Britain, Germany, France, Italy, Belgium and Japan, and under the new equality of the States forming, under the Crown, the British Commonwealth, there were included also the Irish Free State, Canada, South Africa, Australia, and New Zealand. More than forty other States will be invited to adhere to the Pact.—*L.J.*, 1928, p. 131.

The Meaning of the Pact.—So far then, we have "the renunciation of war as an instrument of national policy." What the practical effect will be, remains for the future to unfold. The Pact is wider in its scope, but less definite in its terms, than the Covenant of the League of Nations. It is wider in its scope mainly because it includes the United States, and probably will include other States which are not parties to the Covenant. It is less definite because it does not, like the Covenant, provide for either judicial settlement of disputes or united action against aggressors. But under the Covenant, the Permanent Court of International Justice has been established, and the Pact should operate powerfully as a restraint upon aggression. As was said by Lord Cecil in the House of Lords on May 15, when the United States proposal was under discussion, it alters the rules and understandings of International Law. Hitherto it has been a plausible rule—Lord Cecil put it more strongly and called it a fundamental principle—that every sovereign nation is entitled to go to war when it thinks that it is desirable so to do in its own interests. That idea, whether it be a plausible rule or an accepted principle, is gone. The right of private war between States is taken away, and International Law is started on a new basis. Hence no State, if the Pact is observed, can conduct negotiations on the basis of its own military force. Military force is pooled for the restraint and punishment of aggressors. Negotiations, when they reach an *impasse*, can be resolved only by judicial process, or arbitration, or conciliation. This is the implication of the Pact. It is for statesmanship, with educated public opinion at the back, to realise it.—*L.J.*, 1928, p. 131.

Madras Bar Council—Elected Members.—Messrs. S. Srinivasa Aiyangar, T. R. Ramachandra Aiyar, T. R. Venkatarama Sastri, Alladi Krishnaswami Aiyar, T. Rangachariar, K. Bhashyam Aiyangar, K. P. M. Menon, P. Venkataramana Rao, K. S. Krishnaswami Aiyangar and S. Doraiswami Aiyar.

Nominated Members.—Messrs. Nugent Grant, Mohamed Ebrahim, C. Venkatachallam Pantulu and T. A. Ramalingam Chettiar.

BOOK REVIEWS.

CIVIL PROCEDURE CODE, by Mr. M. C. Sarkar, 7th edition 1928. Published by Messrs. Butterworth & Co. Price Rs. 22.

This is the seventh edition of a popular commentary on the Civil Procedure Code. Even when the sixth edition of this work was published it was felt that the work had grown so much in bulk that it might have appeared in two volumes. Nearly three years have elapsed since then and the present edition has been published in two volumes. The learned author has incorporated the decisions since the appearance of the last edition. Although he says in his preface that the cases down to the date of publication have been noted, we do not find any reference to the decision of the Privy Council in *V. P. R. V. Chokkalingam Chetty* v. *Seethai Acha and others* [(1927) I. L. R. 6 R. 29 : 54 M. L. J. 88 (P. C.).] which appeared in the January part of the Rangoon Series and which relates to the power of the appellate court to add parties in appeal or the decision of the Calcutta High Court in *Surendra Kumar Roy Chowdhury* v. *Sushil Kumar Roy Chowdhury* [(1927) I.L.R. 55 C. 249] on the power of a Court to appoint a receiver pending reference to arbitration through Court which appeared in the March part of the Calcutta Series. It is possible that these cases appeared after the present edition went through the press and could therefore not be included. A new feature of the present edition is that the High Courts Act of 1861, the Government of India Act of 1915, the Letters Patent of the various High Courts and the Rules made from time to time by the Chartered High Courts have been incorporated in this edition in the form of appendices. Going through the appendices, we find that the amendment of clause 15 of the Letters Patent of the Calcutta, Madras and Bombay High Courts, requiring the certificate of Court as to fitness in the cases of some classes of Letters Patent appeals has not been incorporated, although the amendment came into force as early as the 14th

January, 1928. The decisions under the Civil Procedure Code and the Rules framed under the Code are growing to such an extent that to cope with them almost annual editions of the Code with commentaries would seem to be called for. We have no doubt that the useful additions to this edition will be appreciated and that it will enjoy a greater measure of popularity.

THE LAW OF INCOME-TAX IN INDIA, by V. S. Sundaram, 2nd edition, 1928. Published by Messrs. Butterworth & Co. Price Rs. 15.

We had occasion to review the first edition of this work and we gave expression to the very high estimate we formed of its utility and value in 53 M. L. J. 27 and we expressed the opinion that it will long remain the leading treatise on the Indian Income-tax Law. The necessity of having to bring out a second edition in about a year after the publication of the first shows that we were justified in having formed such a high opinion of the work. It is a matter for great satisfaction that the author has in the midst of his pressing official duties found time to revise and bring up to date his work on the Law of Income-tax in British India.

PROBATE PROCEDURE IN BRITISH INDIA, by Mr. H. D. Cornish, B.A., Bar.-at-Law, Administrator-General of Madras. Published by Messrs. Higginbothams, Madras, 1928. Price Rs. 10.

We welcome the publication on Probate Procedure in British India from the pen of one who is most competent to write on the subject on account of his intimate acquaintance with Probate practice in his official career. The distinctive feature of the writings of the learned author has been his lucidity of the statement of the law. As this branch of the law is largely based upon the English Testamentary practice, the decisions of the English Courts have been freely referred to. The treatment of the subject is not by way of commentary to any enactment but is in the logical order of the topics dealt with, such as the testator, the will, the executor, the administrator, the petition for Probate, the Probate jurisdiction and the grant of Probate. The six appendices give the testamentary rules of Calcutta, Madras, Bombay, Rangoon, Allahabad and Patna. We have no doubt that the book will be found very useful by those having to deal with the subject.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, by K. V. Srinivasa Aiyar, Advocate, Madras and K. V. Sundaresa Aiyar, Pleader, Madura. Price Rs. 3.

This is a commentary on the Madras Hindu Religious Endowments Act of 1927 as amended by Act I of 1928. The Madras Hindu Religious Endowments Board is fast developing into a tribunal having to decide questions on the construction of the Act and under the general law of Trusts, and the assistance of lawyers is frequently invoked for arguments before the Board. It is therefore necessary to have a commentary setting out the scope of the sections of the Act and the decisions of Courts on analogous points of law. The authors have therefore done well in having brought out this publication which will be useful to the various classes of persons having to deal with the enactment. The authors have, it must be noticed, given references not merely to the decisions of the superior courts but also to the rulings of the Hindu Religious Endowments Board itself. It may perhaps be more advantageous to have given some of the leading decisions of the Board *in extenso,* in cases where the authors considered them to be of value, as such decisions are not otherwise easily available to the public. The appendices, which are seven in number, give the analogous provisions of other enactments, the rules framed by the Local Government and the bye-laws framed by the Hindu Religious Endowments Board and other useful information. We would suggest that the authors should in the succeeding editions of their work give not merely references to only one unauthorised report of the decisions which have appeared in other reports as well, but give references to all the reports in which the decisions have appeared and thus enhance the utility of the publication.

We are glad to acknowledge the receipt of the Text of the Indian Bar Councils Act (XXXVIII of 1926) as amended up to date with the rules made by the Madras High Court, published by the Madras Weekly Notes Office.

THE
MADRAS LAW JOURNAL.

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THE MEASURE OF DAMAGES FOR CONVERSION.

The question of the proper measure of damages in cases of wrongful conversion has been the matter of some difference of opinion among Courts both in England and in America. The guiding principle of course is that the owner should be fully indemnified, but its application in practice is by no means easy, especially in cases where the market price of goods fluctuates subsequent to the date of conversion. Broadly speaking, three views have been enunciated. One is that the owner is entitled to the value of the goods as at the date of conversion. (Mayne on Damages, 10th Ed., p. 377.) It is conceded that interest might sometimes be allowed on the amount so ascertained. In certain cases the jury has been permitted in their discretion to adopt as the basis the market price prevailing on some date subsequent to the conversion. In this class of cases the price of the goods at the date of the commencement of the action or on the date of trial has in general been taken to be the criterion. A third view which appears to be more popular in America than in England is that damages should be awarded on the basis of the highest price which the goods had borne between the date of the conversion and the date of the verdict. Sometimes Courts have awarded special damage over and above the value of the goods, but the real difficulty arises in estimating the value of the goods themselves.

The last view mentioned above which Sedgwick describes as "the rule of higher intermediate value" (Sedgwick on Damages, 9th Ed., p. 991) is from all points of view the least satisfactory. The rule itself is sought to be applied in several other forms of action, in actions for detinue, for non-replacement of stock and for refusal to deliver goods paid for in

advance. Logically the rule means that after default once made, it would be in the plaintiff's power either by hastening or delaying his suit during the period prescribed by the Statute of Limitations to take advantage of a rise in the market without any risk in case of a fall. Damages founded on such an estimate, it is submitted, are either purely speculative or plainly vindictive. It is too much to assume that the owner would have sold the goods exactly on the day when the maximum price prevailed. As observed by Romer, J., in *Mansell* v. *British Linen Co.*,[1] "His difficulty is amply shown by the well-known fable of the man who had to go through a pathway in a field of corn, not being able to turn back, and his duty being to cut down the highest blade of corn he passed in his journey. He passed several high blades, but did not cut them, hoping to reach a higher blade later on and he came to the end of the path and he cut no blade at all." The rule is sometimes sought to be supported on the ground that everything must be presumed against a wrongdoer but that principle can hardly apply when there is nothing more than a bare possibility of the owner acting in that manner. The case will stand differently where the owner at a particular date in the interval calls upon the wrongdoer to return the value of the goods, but then it will not fall under the rule of higher intermediate value.

This rule was rejected by Mansfield, C. J., in the very early case of *M'Arthur* v. *Lord Seaforth*.[2] That was an action for failure to replace stocks on a particular date, but the principle is equally applicable to cases of conversion. Certain other cases are, quite erroneously, supposed to have approved of the rule. *Greening* v. *Wilkinson*[3] and *Johnson* v. *Hook*[4] were cases of wrongful conversion of goods warehoused, and *Elliot* v. *Hughes*[5] was an action for damages for the non-delivery of goods paid for in advance. In all these cases there was a continuous rise in the price of the goods up to the date of the trial and all that the learned Judges laid down was that the compensation need not be restricted to the value of the goods at the date of the conversion. The rule of higher intermediate value was neither canvassed nor adopted. The rule, however, was applied by Creswell, J., in *Archer* v. *Williams*,[6] an action

1. (1892) 3 Ch. 159 at 163.
2 (1810) 2 Taunt 257 : 127 E. R. 1076.
3. (1825) 1 Car. & P. 625 : 171 E.R. 1344. 4. (1883) 31 W.R. 812.
5. (1863) 3 F. & F. 387. 6. (1846) 2 Car. & P. 26.

in detinue for failure to re-deliver scrip certificates. But the jury refused to apply the rule and eventually the question of damages was settled by compromise. By the time the writ of error was heard the scrip certificates had been re-delivered and the damages for detention were measured by the difference in their values at the time of demand and of re-delivery. (See *Williams* v. *Archer*[7].) The rule was expressly rejected in *Mansell* v. *British Linen Co.*[1] an action for damages for wrongful injunction restraining plaintiff from alienating shares. The decisions of American Courts, especially in New York, where the rule has found favour seem to proceed on *a priori* considerations rather than on well-established principles. (*See* Sedgwick on Damages, 9th Ed., p. 995.)

There is one exceptional class of cases in which the rule may justly be applied, that is, where the owner is kept in ignorance of the wrongful act up to a certain time and the value of the goods has fluctuated in the interval. The reason is that, the wrongdoer having failed to communicate his act to the owner, the latter was prevented from disaffirming the transaction and claiming damages on such date as he might choose. This is really an application of the maxim *Omnia praesumuntur contra spoliatorem*. The rule will apply under those circumstances whether it be the case of non-replacement of stocks or wrongful conversion of goods and it will make no difference whether they are ordinary articles of merchandise or not. The cases which declare that directors of a company guilty of misfeasance in holding shares against the articles of association should pay the highest value of the shares while in their possession are explicable on this footing. (*Mckay's case*[8] and *Eden* v. *Ridsdales Railway Lamp and Lighting Co., Ltd.*[9])

On the other hand it is a rule of doubtful justice to award damages in all such cases on the basis of the value of the goods at the date of the conversion. It may be proper to apply the standard in a case where the tort is committed under a *bona fide* mistake. Thus the agent may in a given case sell the goods under a mistaken belief as to his authority or by an improper exercise of the same. In such cases the state of mind of the wrongdoer is rather important. As Mr. Mayne observes:

1. (1892) 3 Ch. 159.
7. (1847) 5 C.B. 318 : 136 E.R. 899. 8. (1875) 2 Ch. D 1.
9. (1889) 23 Q.B.D. 368.

"If malice can render an innocent act wrongful *a fortiori* it must render a wrongful act more wrongful and, therefore, be provable in aggravation of damages." (Mayne on Damages, 10th Ed., p. 40.) This distinction has been clearly kept in view in cases where minerals have been carried away by unauthorised mining. (See *Wood* v. *Morewood*[10].) The rule itself will logically mean that the agent may in a given case sell the goods at a time most unfavourable to the principal and yet the latter can only recover the actual sale price. By what principle of justice or equity, one may ask, is the owner to be deprived of the profits which every tradesman in such circumstances can reasonably hope to make? If the date of conversion should be departed from, it may also be asked, what is to happen, when there is a falling market subsequently? The answer is simple enough. The plaintiff gets the benefit of the sale price in such a case because of two well-established principles, namely that the wrongdoer cannot make a profit out of his wrong, and that "the owner may elect to waive the tort and sue the defendant for the sale price as money had and received for the use of the plaintiff." (Underhill's Law of Torts, 10th Ed., p. 288. See also *Bavins Junior and Sims* v. *London & S. W. Bank.*[11])

It cannot be said that to depart from the above standard will result in providing for speculative profits. In an action for conversion the damages are awarded to the plaintiff for the loss of his goods and in fact it has been held that property in the goods passes to the defendant only after the decree for damages is satisfied. (*Sinnan Chetti* v. *Alagiri Aiyar*[12].) It is but just that he should be compensated with such damages as will enable him to replace his goods at any particular time he may choose. (*Glasspoole* v. *Young*[13].) The rule is not so harsh as it appears, because it is all the time open to the tortfeasor to return the value of the goods he had realised and then the damages will be restricted as in cases of detention. It may be argued that the plaintiff can, after becoming aware of the conversion, go into the market and stock other similar goods and thus have the benefit of a rising market. But nothing is more dangerous than to adopt this rule. Even in cases of contracts, in which the duty of the plaintiff to mitigate the loss is well

10. (1841) 3 Q.B. 440 : 114 E.R. 875, *per* Parke, B.

11. (1900) 1 Q.B. 270 (C.A.).

12. (1923) I.L.R. 46 M. 852 : 45 M.L.J. 516 (F.B.).

13. (1829) 9 B. & C. 696 : 7 L.J. (O.S.) K.B. 305.

established, it is a matter of considerable doubt whether such an onerous obligation should be placed upon the plaintiff. (See *Smith* v. *McGuire*[14].) Assuming, however, that the rule is well established in the law of contracts, there is a fundamental difference between cases of contracts for delivery of goods and cases of conversion. In the former case the purchaser has the money in his hands and may go into the market and purchase similar goods; but in the latter, the wrongdoer has the money in his hands and prevents the owner from using it. An argument such as that mentioned above was rejected by Abbot, C. J., in *Greening* v. *Wilkinson*[3] in the following words: "It may be said that if he had wanted cotton he might have immediately bought more, at that day's price, as soon as he found that this cotton was detained from him, but then to do that he must have had the money which he might not have ready on the very day of the detention nor on any day after till the price had risen." It seems to be entirely unjust to ask the plaintiff to pay the price a second time in order to procure a similar article to that of which he has been deprived. Assuming that every new purchase becomes in turn the subject of a fresh act of conversion should the owner go on replacing the goods every time?

It is in this connection that the cases of non-replacement of stocks and non-delivery of goods paid for in advance bear some analogy. In the stock cases it has been consistently held that the plaintiff is entitled at his option to the value at the date of replacement or on the date of trial.* Mr. Mayne takes the view that the stock cases stand apart and that a higher value is adopted in such cases because "stock may be supposed to be purchased rather for investment than for re-sale while goods are bought to use or to sell again." (Mayne on Damages, 10th Ed., p. 179.) This distinction, however, seems to be too artificial. In modern times stocks are as much the subject-matter of sale and re-sale as any article of merchandise. Such a distinction was rejected by the Court of Appeal in a case of wrongful detention of stock. (*Williams* v. *The Peel River*

3. (1825) 1 Car. & P. 625 : 171 E.R. 1344.

14. (1859) 3 H. & N. 554 at 567 : 157 E.R. 590, *per* Martin, B.

*See *Forrest* v. *Elwes*, (1799) 4 Ves. Jun. 492 : 31 E.R. 252; *Shepherd* v *Johnson*, (1802) 2 East 211 : 102 E.R. 349; *Downes* v. *Back*, (1816) 1 Start 318 : 171 E.R. 485; *Harrison* v. *Harrison*, (1824) 1 Car. & P. 412 : 171 E.R. 1253; *Owen* v. *Routh*, (1854) 14 C.B. 327 : 139 E.R. 134 and *Michael* v. *Hart*, (1902) 1 K.B. 482 (C.A.).

Land and Mineral Co., Ltd.[15]) In fact the stock cases proceed upon the larger ground that the wrongdoer had kept the plaintiff out of his money and thus had rendered it impossible for him to take the benefit of a rising market. Baron Parke pointed out in *Shaw* v. *Holland*[16] that this was the distinction between cases of not replacing stock and cases of non-delivery of goods. (See also *Gainsford* v. *Carroll*[17] and *Robertson* v. *Dumaresq*[18]).

Similarly in the case of goods paid for in advance the purchaser is deprived of the use of his money by an act of the seller and in such a case the value of the goods at the date of trial has been taken to be the measure of damages. *Elliot* v. *Hughes*[5] is a case of this kind. It was there decided on the analogy of the stock cases that the purchaser could recover the value of the goods as on the date of the verdict. The earlier case of *Startup* v. *Cortazzi*[19] is supposed to have laid down a contrary rule. But as a matter of fact in that case only a portion of the purchase money had been paid in advance and it was on the ground that the plaintiff was kept out of his money rather than his goods that the compensation was restricted to the re-payment of the money advanced with interest. In fact Alderson, B. points out in the course of the judgment that "another criterion in such cases for estimating damages is to consider the loss of the gain which the party would have made if the contract had been complied with." One other case may be usefully referred to in this connection and that is *Barrow* v. *Arnaud.*[20] That was a case of wrongful detention of goods by the customs authorities. In awarding damages on the larger scale Tindal, C. J., distinguished it from ordinary cases of contract on the ground that the owner was kept out of his money by the wrongful act of the defendant and that consequently the latter should answer for all the losses resulting from his act.

It will thus appear that it is hardly satisfactory to adopt the value of the goods at the date of the conversion as the basis

5. (1863) 3 F. & F. 387.
15. (1887) 55 L.T. (N.S.) 689, *per* Bowen, L.J.
16. (1846) 15 M. & W. 136 : 153 E.R. 784.
17. (1824) 2 B. & C. 624 : 107 E.R. 516.
18. (1864) 10 L.T. (N.S.) 110 at 113, *per* Lord Chelmsford.
19. (1835) 2 C.M. & R. 165 : 41 E.R. 710.
20. (1846) 8 Q.B. 604 : 115 E.R. 1004.

of damages where there is a rising market subsequent to that date. Any compensation allowed by the Court by way of interest on such an amount may in many cases prove totally inadequate. Such a view of damages seems to place too high a premium on the act of the wrongdoer. The action under those circumstances becomes merely one for money had and received. As Clerk and Lindsell point out, in none of the numerous cases in which the value at the date of conversion has been adopted as the basis of damages was the question of fluctuation in value ever raised. (Clerk and Lindsell on Torts, 7th Ed., p. 272. See also *Folk* v. *Fletcher*,[21] *Johnson* v. *Lancashire, Yorkshire Railway Co.*,[22] *Henderson* v. *Williams*[23] and *Rhodes* v. *Moules*.[24]) The real controversy in *Read* v. *Fairbanks*[25] and *France* v. *Gaudet*[26] was whether the plaintiff was entitled to recover the freight or the estimated profits by way of special damage. In this connection it may be pointed out that the rule laid down in *Mercer* v. *Jones*,[27] that in trover for bill of exchange the damages should be calculated according to the face value of the bill together with interest is unobjectionable because in such a case there is no fluctuation in the value of the article. In fact Abbot, C. J., who is responsible for laying down a more liberal rule in the case of goods and merchandise held in *Paine* v. *Pritchard*[28] that that was the proper rule in cases of bills of exchange.

If the date of conversion is departed from the question arises, where exactly should the line be drawn. It has been suggested that the value of the goods on the date on which the plaintiff had notice of the conversion may be taken as a guide; but how can the mere communication of the wrong place the owner in a better position? On the other hand, how can such a notice unaccompanied by any payment of the money actually realised give any rights to the wrongdoer? (See the observations of Stephen, J., in *Johnson* v. *Hook*.[4]) There is no case in which the date of notice has been recognised to be the material

4. (1883) 31 W.R. 812.
21. (1865) 18 C.B.N.S. 403. 22. (1878) 3 C.P.D. 499.
23. (1895) 1 Q.B. 521. 24. (1895) 1 Ch. 254.
25. (1853) 13 C.B. 692 : 138 E.R. 1371.
26. (1871) L.R. 6 Q.B. 199 (C.A.).
27. (1813) 3 Camp. 477 : 170 E.R. 1452.
28. (1827) 2 Car. & P. 558.

point of time in assessing damages. In *Greening* v. *Wilkinson*[3] and *Johnson* v. *Hook*[4] the jury fixed the value on a particular day between the conversion and the date of the trial. The contention in such cases has generally been that the value should be taken as on the date of the commencement of the action or at the trial. It must be admitted, however, that the latter alternative introduces a good deal of uncertainty. After all there is no reason why the rights of the parties should be affected by the law's delay. If it is said that it is on that date that the plaintiff is enabled to purchase other similar goods, it may not be true; because the money may in fact be realised at a subsequent date. It is submitted that the proper way of assessing damages in such cases is to fix them with reference to the value of the goods on the date when the owner, after becoming aware of the conversion, calls upon the wrongdoer to make good the loss of his goods. This reduces the element of uncertainty to a minimum while affording every chance to the owner for being adequately compensated. It is only as expressing such a demand that the commencement of the action can be taken to be the material point of time.

While it must be confessed that any theory as to the measure of damages in such cases has necessarily to be complicated, the result of the foregoing discussion may be briefly stated as follows:—(1) Where there is no fluctuation in the price of the article converted the value at the date of conversion together with interest is the proper measure of damages. (2) Where the fluctuation takes the shape of a falling market subsequent to the conversion the owner is entitled to recover the amount actually realised by the wrongdoer together with interest. (3) Where the fluctuation shows a rising market but the conversion is proved to be the result of a *bona fide* mistake on the part of the tortfeasor the value of the goods at the date of conversion can be adopted as the basis of damages. (4) Where the conversion takes place under aggravating circumstances, and the wrongdoer does not communicate the same to the owner, the latter can claim damages on the basis of the highest value of the goods during the period when the owner did not have knowledge of the wrongful act. (5) Where the conversion takes place under aggravating circumstances and the owner does not adopt the option under the

3. (1825) 1 Car. & P. 625 : 171 E.R. 1344.
4. (1883) 31 W.R. 812.

preceding rule he may, at any time after the conversion but before the period prescribed by the Statute of Limitations, call upon the wrongdoer to make good the loss of his goods. In such a case damages are to be assessed according to the value of the goods on the date of the demand. (6) Where at any time subsequent to the date of conversion the wrongdoer pays the owner the value of the goods actually realised by him the damages will be restricted, as in cases of detinue, to the difference between the amount so paid and the value of the goods estimated on the basis of the market price prevailing on that date.

Some comment is appropriate upon the way in which the Indian Courts have viewed the question. In the large majority of cases the value of the goods at the date of conversion has been adopted as the measure of damages. But no argument seems to have been advanced in any of those cases on the basis of the fluctuation in prices. The recent case of *Alliance Bank of Simla* v. *Firm of Ghamandi Lal Jaini Lal*[29] may be taken as typical. That was a case of unauthorised sales by a bailee and the Court awarded damages on the basis of the market value at the date of conversion. The decision of the Court of Appeal in *Henderson* v. *Williams*[23] was followed. But a perusal of the judgments will show that neither in the English case referred to nor in the Indian case which followed it, was any point sought to be made on the ground of fluctuation in prices. In a decision of the Sind Judicial Commissioner's Court there is a discussion as to how damages should be assessed in a case of fluctuation in prices. (*Louis Dreyfus & Co.* v. *Firm of Ghandamal & Co.*[30]) The Court held that damages need not be restricted to the value of the goods at the time of conversion. This case is closely analogous to *Johnson* v. *Hook*[4] both on the facts and on the measure of damages that was adopted.

In this connection the recent decision of the Madras High Court in *Tadi Sara Reddi* v. *Chelamcherla Brahmayya*[31] calls for more than a passing notice. The commission agent sold the goods without any reason whatever and in spite of stringent instructions from his principal not to do so. In an action to recover damages their Lordships held that the principal could recover the

4. (1883) 31 W.R. 812. 23. (1895) 1 Q.B. 521.
29. (1927) I.L.R. 8 Lah. 373. 30. (1918) 52 I.C. 878.
31. (1928) 55 M.L.J. 586.

value of the goods prevailing on a particular date shortly after the conversion. It was held that the plaintiff should be given some reasonable time after becoming aware of the sale to go into the market once again and stock similar goods. Before testing the correctness of the decision reference may be made to certain observations made by Srinivasa Aiyangar, J., in delivering judgment. His Lordship held that the rule of higher intermediate value was inapplicable to the particular case, but at the same time pointed out that it could be invoked in a case of conversion of articles of special value such as precious jems. It is extremely doubtful if the rule will apply even to such a case. A wrong does not become the greater because the goods in respect of which it was committed are not available in the market, nor will the owner be entitled, apart from special damage, to recover the value on the basis of what *could* have been the price. Apparently His Lordship had the case of *Armory* v. *Delamirie*[32] in view but that case simply held that the value of the best diamond should be given, it did not say that the highest value it could have sold for at any time should have been awarded. His Lordship again observed in the course of his judgment that the mere fact that the wrongdoer stands in a fiduciary relationship to the owner is of no consequence except perhaps to raise certain presumptions on facts. But it is settled law that the relationship of the parties is material in deciding whether the conduct of the wrongdoer is *bona fide* and that is a circumstance which is provable in aggravation or mitigation of damages. In fact in a case such as the one under discussion there are two wrongs, one the conversion of the goods and the other the failure to abide by the contract arising from the fiduciary relationship.

The way in which His Lordship assessed damages in the case is even more novel. It proceeds on the assumption that it was the duty of the owner to go into the market within a reasonable time after he came to know of the conversion and purchase other similar goods. The unsoundness of this position has already been indicated. Suppose the tradesman had invested all his fortune on a single venture and the goods had been converted and he had no money, should he borrow on the credit of his claim against the tortfeasor in order to stock other goods? Assuming he could do that, is it just that such an onerous obligation

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32. (1722) 1 Str. 504.

should be placed on him? His Lordship relied on two cases which on examination, however, do not support the conclusion arrived at. The case of *Burma Trading Corporation, Ltd.* v. *Mirza Mohomed Ally*[33] was an action for conversion but all that was held therein was that the value should be ascertained according to the price of the goods at the place where the principal market existed for them. This is perfectly correct and is in accordance with English cases. It was also laid down in that case following *Morgan* v. *Powell*[34] that the wrongdoer should be indemnified for expenses he had incurred on account of the sale. The case itself is no authority on the question as to how damages should be ascertained in a case where the market price fluctuates after the conversion. The other decision which is adverted to is *Manchubhai Navalchand* v. *John H. Tod.*[35] In that case Farran, J., laid down a threefold rule. First that in cases where the article is unique such as a picture the cost of re-purchase will be the criterion. Secondly, in the case of intermediate articles, such as pearls, the owner is entitled *wherever there is no rise in the market* to recover the expenses of sale and re-purchase by way of damages. Lastly, it was stated that "in the case of articles of common merchandise the state of the market subsequent to the sale would afford the criterion by which to fix the loss. If the market rose, the principal would sustain, and could prove a loss; if it fell he could not, as he could without loss put himself in his original position by purchasing merchandise of the same quality." It is rather unfortunate that this decision was not correctly understood in the case under discussion. As a matter of fact in that case the money realised at the sale had been paid to the principal long before and yet the Court held that the principal could recover damages with reference to the state of the market subsequent to the conversion, because obviously only by such a process can the owner purchase other similar goods and that is the only manner in which he can be fully indemnified.

To say the least, the rule adopted in the Madras case seems to be arbitrary. His Lordship rightly observed that "after all, a Court can only do its best by way of fixing the amount by the grant of which it will seek to place the plaintiff, as far as money can do it, in the same position in which he would have

33. (1878) L.R. 5 I.A. 130. 34. (1842) 3 Q.B. 278.
35. (1894) I.L.R. 20 B. 633.

been, had not the wrong been committed." But how is that to be achieved? It can only be achieved by enabling the owner to purchase other similar goods by going into the market. The value of the goods at the date of conversion if inadequate for this purpose must be supplemented by way of damages. Applying this test, which is also the one approved in the Bombay case, a decree should have been passed in the case under discussion in favour of the plaintiff for the difference between the amount that was accepted by the principal under protest and the value of the goods ascertained on the basis of the market price prevailing on that date. This will also be in accordance with the scientific rule as to the measure of damages enunciated above.

B. V. VISWANATHA AIYAR.

SUMMARY OF ENGLISH CASES.

MARSHALL, *In re* GRAHAM *v.* MARSHALL, (1928) 1 Ch. 661.

Will—Construction—Absolute gift—Subsequent gift over Failure of the gift over—Validity of the original gift.

A testator by his will appointed executors and trustees and after making various pecuniary and specific bequests he devised and bequeathed all his real and personal estate to the use of his trustees upon trust for conversion as therein mentioned and he directed that his trustees should make such payments as in his will mentioned and should invest the residue of the monies in the manner therein mentioned and pay the income thereof to his wife during her life and after her death the trustees should stand possessed of the trust fund and the income thereof in trust to pay 2|7th parts thereof to his son M. M. and another 2|7th to his son A.J.M. and one-seventh to each of his three daughters provided that the share expressed to be given to his son M. M. and to his daughters shall not vest absolutely in them but shall be retained by his trustees and in the event of the death of M. M. without leaving any children surviving him his share shall sink into and form part of his residuary estate, and he directed that his trustees should divide his residuary estate among charitable or benevolent objects. After the death of the testator, his son M. M. died as a bachelor intestate. Letters of Administration of his estate were granted to his widow. The gift of the

residue was held by the Court to be invalid. The question arose whether the share of M. M. passed as upon the intestacy of the testator or belonged to the testator's widow as his legal personal representative.

Held, that the interest of M. M. passed to his father's widow.

A DEBTOR, *In re* LAWRENCE, *Ex parte*, (1928) 1 Ch. 665.

Bankruptcy—Debt payable by instalments—Total amount more than £ 50—Judgment for two instalments for less than £ 50—Tender of the third instalment by the debtor—Refusal of tender—Bankruptcy notice on judgment debt—Subsequent petition on the entire debt—Sufficient cause—Bankruptcy Act, S. 5, *sub-section* (3).

Two instalments of a debt payable in three instalments having fallen due, the creditor instituted an action for the recovery of the overdue instalments and obtained judgment on the 3rd January, 1928. The third instalment became due between the date of the writ and the date of the judgment. On the 4th January the debtor sent a cheque for the third instalment, but the creditor's solicitors wrote saying that the cheque was not cleared but will be held until satisfaction was received in respect of the amount for which judgment had been obtained. On the 9th January the debtor wrote to the creditor saying that in lieu of the cheque he was sending cash for the third instalment but this was refused on the ground that the creditor was not prepared to accept any payment less than the full amount of the debt. On the 27th January the creditor filed a Bankruptcy notice in respect of the judgment debt. This notice contained a clerical error. On 16th February the creditor presented a petition for a receiving order alleging that the debtor owed him about £ 71 made up of the judgment debt and the final instalment and that he had failed to comply with the bankruptcy notice of the 27th January.

Held, that though at the date of the petition there were two debts amounting to over £ 50, the debtor had on the petitioner's invitation offered him cash for the third instalment debt and if that had been accepted the total debt would have been under £ 50 and that the refusal by the creditor of this amount amounted to "sufficient cause" within the meaning of Section 5 (3) of the Bankruptcy Act for not ordering the petition.

BATES, *In re.* MOUNTAIN *v.* BATES, (1928) 1 Ch. 682.

Company—Sale of machines for sums exceeding their values as stated in the balance sheet—Distribution of proceeds as bonuses—Bonuses whether capital or income.

A company owned certain steam fishing vessels, some of which were sold at prices considerably in excess of the values attributed to them in the books and balance sheets with the result that the company with its capital still in tact, became possessed of a surplus in cash which was invested in war stocks and other securities. This surplus was afterwards distributed among the share-holders as bonuses. On the dissolution of the company the assets were more than sufficient to repay all the capital.

Held, that this amount must be treated as income and not as capital.

WAY *v.* BISHOP, 97 L. J. Ch. 267.

Solicitor—Covenant not to practise within a given area—Acting as managing clerk to another solicitor—If amounts to breach of covenant.

Where the deed of partnership of solicitors contained a clause that one of them should not practise within a given area after the expiration of the partnership and that solicitor after the expiration of the partnership acted as the managing clerk to another solicitor within that given area,

Held, that his action did not amount to a breach of the covenant.

ATTORNEY-GENERAL *v.* PRITCHARD, 97 L.J.K.B. 561.

Sale of goods—Purchase money to be paid in instalments—Property to pass after payment of instalments—Non-payment of instalments—Death of purchaser—Abandonment of goods by executor—Vendor taking possession—Action against purchaser for purchase price—Maintainability.

A clause in a lease-deed provided that the lessee was to pay the cost of furniture and effects on the leasehold premises in six yearly instalments and the property in these goods should pass to the lessee after payment of all the instalments. None of the instalments was paid. The lessee died and his executors and beneficiaries remained in possession of the leasehold premises for

some time and subsequently vacated it. The vendor resumed possession of the furniture and effects and brought the present action against the executors and beneficiaries for the recovery of the unpaid instalment of the purchase money.

Held that, as the vendor had resumed possession of the goods and dealt with them in such a way as to put it out of his power to return it to the purchaser, his proper remedy was to sue for damages for breach of contract and not for recovery of purchase price.

GENERAL MEDICAL COUNCIL *v.* INLAND REVENUE COMMISSIONERS, 97 L.J.K.B. 578.

Income-tax Act, S. 37—General Medical Council—Council established mainly for the benefit of medical profession—Council incidentally beneficial to community—Exemption from income-tax.

The General Medical Council was established mainly for the purpose of distinguishing qualified from unqualified practitioners and the principal duties imposed by the Medical Act upon the Council were to keep and publish a register of qualified medical practitioners, to exercise oversight upon medical studies and examinations and to publish the British pharmacopoeia. The Council's income consisted of registration fees in connection with colonial and foreign qualifications, interest on investments, and profits on the sale of publications. There were also contributions from the English, Scottish and Irish branch Councils which collected the registration fees from the practitioners of those places. The expenditure of the Council consisted mainly of fees and expenses paid to members of the Council and its committees, the cost of inspecting medical examinations, printing, including the cost of printing the medical register and office expenses and sundries. The Council contended that it was a body of persons established for charitable purposes only, that the income of the Council was applicable and had been applied to charitable purposes only and that therefore it was exempt from income-tax. The Crown contended that the Council was a professional institution whose objects, aims and activities were directed mainly to the interests of medical profession and that therefore its income was taxable.

Held, that this Medical Council was not a charity within the meaning of S. 37. of the Income-tax Act and its income was not money which was applied for charitable purposes only.

WATSON *v.* GOVERNMENT INSTRUCTIONAL CENTRE, BIRMINGHAM, 97 L.J.K.B. 596.

Workmen's Compensation Act, S. 3—Workman—Unemployed youth admitted to Government Instructional Centre for training.

The expression "workman" in S. 3 of the Workmen's Compensation Act means any person who has entered into a contract of service or apprenticeship. Consequently, a young person who had been unemployed and who was admitted to a Government Instructional Centre for being trained at the workshop is not a workman, as the relationship between him and the Minister of Labour is not one of master and servant but that of pupil and teacher.

LLOYDS BANK *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, 97 L.J.K.B. 609.

Banker and Customer—Cheque drawn upon another Bank—Cheque paid into private account—Collecting Bank not making any enquiry—Claim for conversion—Indian Negotiable Instruments Act, S. 131.

The plaintiff Bank banked with the Imperial Bank of India and their cheques must be signed by two of their officials. One of their officials was one *L*, their accountant who had over him in the Bank three superior officials. *L* had an account in the joint names of himself and his wife at the defendant Bank. *L* carried on a complicated system of fraud involving some 19 fraudulent cheques. He signed and by fraud procured another authorised official to sign 19 cheques on the Imperial Bank of India made payable to the defendant Bank. He sent them to the defendant Bank for collection on his behalf, the instructions to collect in that way being contained in a paying-in slip or more generally in an accompanying letter requesting the defendant Bank to place the accompanying cheque to the credit of his joint account and signed by *L* only. The letter was on the Bank's letter paper with printed heading. The defendant Bank collected the cheque which was duly honoured by the Bank of India and placed it to *L.'s* account. The account showed that it was

generally in small credit till the arrival of each fraudulent cheque, the funds collected from which were promptly drawn out. These fraudulent cheques were not discovered for a long time by reason of a complicated series of fraudulent entries; partly also by the neglect by the plaintiff bank of a series of elementary precautions. The plaintiff bank sued the defendant bank for conversion of the cheques.

Held, (1) that each cheque taken by itself was "issued," being signed and dealt with by persons having ostensible authority to sign and issue it, but the accompanying memorandum signed by *L* alone and its directions gave notice of irregularity which destroyed the "holding in due course";

(2) that, as the defendant bank had a title as a holder under the Indian Act, defective through notice, they were "true owners" within the meaning of S. 131 of the Indian Act;

(3) that the defendant Bank had not proved that they collected without negligence, as an examination of *L.'s* account would have put the defendant Bank on enquiry as to the source from which the payments were made; and

(4) that the plaintiff Bank was therefore entitled to succeed.

LEVENE *v.* INLAND REVENUE COMMISSIONERS, (1928) A.C. 217.

Income-tax—Residence—Ordinary residence—Assessee leaving United Kingdom and living abroad on medical advice—Stay for some months in each year in the United Kingdom—Income-tax Act, S. 46 (1).

A British subject after selling his furniture and surrendering the lease of his house went abroad to live there on medical advice. He lived abroad from 1919 to 1925. But in each of these years he used to return to England and spend some months there. While abroad and while in England he lived in hotels. He was assessed to income-tax for the fiscal years 1920-1921 to 1924-1925 in respect of his income from securities of British possessions and British war loans.

The assessee contended that he was neither resident nor ordinarily resident in the United Kingdom during the years in question and therefore exempt from payment of tax. The Special Commissioners of Income-tax held that he was resident

and ordinarily resident in the United Kingdom during these years and dismissed his claim.

Held, that the assessee was liable to pay tax as he was both resident and ordinarily resident in the United Kingdom having left it only for the purpose of occasional residence and that the findings of the Commissioners were findings of fact which could not be disturbed.

INLAND REVENUE COMMISSIONERS *v.* LYSAGHT, (1928) A.C. 234.

Income-tax—Residence—Ordinary residence—Assessee having a permanent house in Ireland—Assessee visiting and staying in United Kingdom for business purposes—Question of fact —Income-tax Act, S. 46 (1).

The assessee was born in England of Irish parents and was the managing director of an English Company. He resided in England with his family till 1919 when he partially retired from the business and having been appointed as an advisory director he sold his property in England and went to live on a family property in Ireland. As the Advisory Director of the English Company, he came to England to attend the meetings every month and when in England he generally stayed in hotels. His visits to England were solely for business purposes and his wife never accompanied him in these visits. He had no business activities in Ireland except the management of his estate in Ireland. He was assessed to income-tax by the General Commissioners for the years 1922-1923 and 1923-1924 in respect of income from foreign and colonial Government securities and war loan. The assessee claimed exemption on the ground that he was neither resident nor ordinarily resident in the United Kingdom. The claim was disallowed and on appeal to the Special Commissioners the same was confirmed.

Held, (by Viscount Sumner, Lord Atkinson, Lord Buckmaster and Lord Warrington of Clyffe, Viscount Cave, L.C. dissenting) that the conclusion of the Special Commissioners was a finding of fact and could not be disturbed as there was evidence to support it.

Held, (by Viscount Cave, L.C.) that the conclusion of the Special Commissioners was a mixed finding of fact and law and even on the assumption that it was a finding of fact it was a finding based upon no evidence.

OTTOMAN BANK *v.* JEBARA, (1928) A.C. 269.

Contract—Sale of goods—Delivery of goods to Syrian customers after outbreak of war with Turkey—Effect of war—"Value cheque on London"—Payment by customer in piastres—Depreciation in value of piastres after war—Suit for sterling value of the goods consigned—Effect of war on executory contract.

The plaintiff, residing at Manchester, was in the habit of buying Manchester goods and transmitting them to correspondents in Syria. The plaintiff used to take a bill of lading making the goods deliverable to the defendant Bank which had branch offices at Manchester and Beyrout in Syria. He also drew a bill upon his particular correspondent for whom the goods were destined and endorsed it to the Bank and on handing over the bills of lading, invoices, etc., to the Manchester branch, the latter would make advance to him on the bill, and would send the shipping documents to their Beyrout branch, who used to collect the price from the customer in exchange for the goods. On the Manchester Branch being advised by the Beyrout Branch that the price had been paid, a cheque for the sterling value of the goods, less any advance made, would be handed to the plaintiff. Accordingly, the plaintiff consigned to Beyrout goods which arrived there shortly before the outbreak of war, on 5th November, 1914, between England and Turkey and on that date the defendant Bank held the bills and documents representing the goods. The form of the bill was "Please pay to our order value cheque on London the sum of £....... sterling." After the outbreak of war, the defendant Bank at Beyrout delivered the goods to the customer on receiving the due amount in piastres which at the moment was equivalent to sterling in London. When the war ended, the value of the piastres greatly depreciated. The defendant Bank offered to pay the plaintiff an equal number of piastres to those which the Bank had received when they handed over the several parcels of goods, *i.e.*, the sterling value of the depreciated piastres.

In an action by the plaintiff for recovery of the sterling value of the several consignments or alternatively damages for conversion,

Held, (1) that the words "value cheque on London" meant that the payment which obviously would not be made in Beyrout in actual English currency must be so calculated as to represent what a cheque in London for the amount would cost.

(2) that the defendant was a debtor for the sterling amount on the face of the bill, and

(3) that the war had not abrogated the contract.

Per *Viscount Dunedin*.—"It is not every contract that is abrogated by the war: it is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy that is so abrogated."

SOUTH BRITISH INSURANCE CO., LTD. *v.* GAUCI BROS. & CO., (1928) A.C. 352.

Arbitration—Action on contract—Plea that award is condition precedent to action—Dismissal of action—Subsequent arbitration—Jurisdiction of arbitrators to construe contract.

The defendant upon an action of contract raised the plea that an award was condition precedent to the right to sue according to the contract and, the plea being upheld, the action was dismissed. The claim was then submitted to arbitration and an action was brought to enforce the terms of the award. The defendant raised the plea that the arbitrators had no power to construe the contract and therefore the award was bad.

Held, that the defendants by their plea in the former action were precluded from raising this contention.

JOTTINGS AND CUTTINGS.

The New Judge at the Hague.—The vacancy on the bench of the Permanent Court of International Justice has been appropriately filled by the election of Mr. Charles E. Hughes, a former Secretary of State of the United States. A political post would not be a title to election, but Mr. Hughes was a member of the Supreme Court of the United States from 1910 to 1916, when he resigned in order to stand for the Presidency against Dr. Woodrow Wilson. The comparison of the Permanent Court with the Supreme Court of the United States and the Judicial Committee of the Privy Council is obvious. In time no doubt the Permanent Court will overshadow the other two; for wide and varied as are their jurisdictions—the Supreme Court over the numerous semi-sovereign communities which form the United States, the Judicial Committee (with the House of Lords) over the world-spread dominions of the British Crown—no limit

can be prescribed for the Permanent Court when, as must inevitably happen, all States submit to it as the guardian of law and order in the world. Mr. Hughes' seat in the Hague Court is a fitting sequel to his earlier position as a Justice of the Supreme Court of the United States.—*L.J.*, 1928, p. 157.

The Death Penalty.—In a letter to *The Times* (18th inst.) which we print elsewhere, Lord Buckmaster says that recent events—notably the result of the Slater appeal and the Home Secretary's eleventh-hour reprieve, because of an "element of doubt," of the three men convicted of the Brighton murder—have raised the capital punishment issue in an acute form, but that the abolition of the death penalty by Parliament without the assurance of popular support would be premature. The difficulty in a matter which is not a party question is to find where public opinion stands, and to get over this the National Council for the Abolition of the Death Penalty is launching a national petition for presentation to Parliament. Such a petition Lord Buckmaster regards as the only effective alternative to a referendum which, under our present constitution, is not available. Our own references to these same events have shown that we regard the question as ripe for discussion and determination, but we are not sure that the proposed method is suitable. In effect, Lord Buckmaster and his friends wish to place the National Petition on the footing of a referendum. Into the arguments for and against that method of submitting proposed legislation to popular approval we need not enter. It is a method to be used only on rare occasions, and its chief use, as Professor Dicey pointed out, is "to curb the absolutism of a party possessed of a Parliamentary majority" (Introduction to *The Law of the Constitution,* 8th Ed.). For questions not of political character it is less suited; and it does not seem to be suited to a matter such as capital punishment, in which sentiment, rather than reasoned consideration of results, is likely to prove a predominating influence. Hence, while we are in sympathy with Lord Buckmaster's desire to bring the subject before the public, we are not satisfied that the proposed petition is the wisest means of doing so.—*L.J.*, 1928, p. 170.

The Lawyers' Duty.—This last is, perhaps, the most unkindest cut of all. If there is one thing on which we pride ourselves, it is the recent reform of the Law of Property, which,

by the congenial process of "evolution, not revolution," has banished the archaisms of past centuries, and, in a series of some half-dozen statutes, has gone far to abolishing the lawyer and teaching every man to be his own conveyancer. Could self-denial go further? But putting this aside as an oversight on the part of Sir Maurice—and, indeed, we doubt whether anyone who ranks as a jurist would confess to knowledge of the New Conveyancing—what about the rest of the law? Equity he does not touch, but the Common Law he regards as hopelessly insular; or, if it has spread to America, this is only because Englishmen have taken it there. "The Common Law reigns only where English-speaking conquerors or colonists have carried it." As Sir Maurice also says, there is no example of any foreign country freely deciding that English Law is worthy of imitation. But this, surely, is in itself no reflection on English Law. Legal systems are a matter of historical development, and are not to be transported wholesale from one country to another, save where, as in the case of America, a void has to be filled. But the point Sir Maurice Amos reaches is that the amendment of the law really lies with the legal profession, save only where some powerful lay interest is touched. To quote again from Cicero's fancied report : "The legal profession must itself be vigilant and fresh-minded in the searching out of defects, and must have the power and duty to amend them—that was what de did in Rome." And that is what the legal profession, when it really wakes up, will do in England.—*L.J.*, 1928, p. 170.

Lord Astor's Bill.—The Wills and Intestacies (Family Maintenance) Bill, which was introduced by Lord Astor in the House of Lords at the close of the Session, was not immediately available, but it has now been published. In this country there has been so far no readiness to interfere with the freedom of testamentary disposition; in other words, society, as represented by Parliament, has been willing for a man, in making his will, to ignore the claims of those who are dependent on him. In general, no doubt, he does not do so. We have been told that when the new Rules of Distribution under the Administration of Estates Act, 1925, were being drafted, a large number of wills were compared, and an endeavour was made to arrive at rules which should represent the average distribution of property. The normal distribution is to give a life interest to the widow and then equal division between children, but this is subject to many

variations. The new Rules of Distribution vary it by giving all chattels and 1,000*l.* to the wife, and a life interest in half the remainder. But this is confined to cases of intestacy. In cases of testacy, the law is only concerned to discover what the testator meant, often a difficult enough task. What he ought to have meant, or what he probably would have meant if his attention had been directed to particular doubts or omissions, does not concern the Court as the interpreter of the will. It may be possible sometimes to avoid an absurd construction, and impossible words have to be wrestled with. "This will," a Judge has been known to say—it was Astbury, J.—"has no meaning, but I have got to give it one." But there the function of the Court stops. It cannot alter an "inofficious" will.—*L.J.*, 1928, p. 181.

The Widow and Children's Portions.—Fortunately there are few countries so backward as our own in this respect, yet even here long resisted changes in the law sometimes come with surprising suddenness. The law of primogeniture had been regarded as a bulwark of society, but when its abolition was incorporated in Lord Birkenhead's scheme for the reform of the Law of Property, the change was accepted, so far as we remember, without a solitary protest. *Leges Angliae nolumus mutari,* said the Barons centuries ago, and so the rule of *Legitimatio per subsequens matrimonium* failed to gain entrance here, although it was recognised in the rest of the civilised world. That also has come, though not so silently as the abolition of primogeniture. "Among all forms of mistake, prophecy is the most gratuitous", said George Eliot in *Middlemarch.* But it is a reasonably safe forecast that interference with testamentary disposition will come like other seemingly stubborn reforms. Whether it will come on the lines of Lord Astor's Bill is a more difficult question. The Continental and Scottish mode is to secure a definite share for widow and children—*jus relictae* and *legitim.* In some of the Dominions the plan has been adopted of allowing the Court to interfere where inadequate provision has been made for the widow and children. There is a somewhat similar jurisdiction under S. 171 of the Law of Property Act, 1925, in relation to the settlement of a lunatic's property. On this several decisions have already been given by the Court of Appeal exercising jurisdiction in lunacy. Lord Astor's Bill combines the two methods. It lays down tests for a proper provision for widow and children, and allows the Court to intervene and award maintenance if

these tests are not complied with. At present it is not necessary to specify the provisions of the Bill in detail, but they should be capable of simplification.—*L.J.*, 1928, p. 182.

The Functions of the Director of Public Prosecutions.—The scope of the duties of the Director of Public Prosecutions—the term "Public Prosecutor", though sanctioned, perhaps, by long usage, is really misleading—was defined in 1886 by regulations framed by the then Attorney-General, Sir Richard Webster, which still remain in force. It is well that members of the legal profession should know the limits of the Director's duties, and we therefore quote the relevant regulation :

The cases in which it shall be the duty of the Director of Public Prosecutions to institute, undertake, or carry on a criminal proceeding in respect of an offence are the following:—

(*a*) Where the offence is punishable with death;

(*b*) Where the offence is of a class the prosecution of which has hitherto (*i.e.*, before 1886) been undertaken by the Solicitor to the Treasury;

(*c*) Where an order in that behalf is given to the Director by the Secretary of State or the Attorney-General;

(*d*) Where it appears to the Director that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest, and that, owing to the importance or difficulty of the case or to other circumstances, the action of the Director of Public Prosecutions is necessary to secure the due prosecution of the offender.

The great majority of the cases now undertaken by the Director of Public Prosecutions come, of course, under the last head, and it is no doubt as well that he takes, as Sir Archibald says, a fairly liberal view of the scope of his duties; in 1925 2,222 matters were reported to him, and 649 prosecutions undertaken, whilst 100 cases of appeal to the Court of Criminal Appeal were considered. The Director is also charged with the important duty of advising Chief Constables and Clerks to Justices on points of criminal law and practice. When the intricacy and difficulty of many of the cases undertaken, and the fact that delay, are borne in mind, it will be realised that the Director's Department is one, not merely of great importance but of great activity.—*L.J.*, 1928, p. 183.

BOOK REVIEWS.

THE TRIAL OF CHARLES I. Edited by J. G. Muddiman. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

Coming, as this volume does, from the pen of Mr. J. G. Muddiman, whom the Earl of Birkenhead describes as "bearing a name famous to historians" we need hardly hesitate in appreciating the motive which has inspired him to bring out "The Trial of Charles I., King of England." The whole trial when read in the contemporary memoirs, and Bradshaw's journal preserved in the Parliamentary records, may not adequately convey to us the enormous moment of the question whether the court which conducted the trial had been clothed with any authority to try him and pass the sentence of execution. Much information contained in some of the weekly journals, at the date of the trial edited by men like Walker, Dillingham, Mabbot, etc., which have been brought to light with indefatigable energy by this author, go much to prove, how high-handed had been the tribunal in its dealing of Charles I. when he was hauled up before it as a common prisoner. Rather, a feeling of horror seizes us towards the close when the sentence was pronounced by the Judge to the satisfaction of an angry army crying for his "execution" and "justice". There is not much of profit to be derived by the lawyer in going through the speech of the Counsel, Mr. Cook, charging the King as a traitor who betrayed the nation. The trial itself is short. For the King instead of defending himself had questioned the authority of those sitting as a Court. The book completely impresses us with its great value to the readers of English History. The tragedy of Charles I., with the history leading up to the pathetic end, is told in these pages, with much precision and penmanship. Indeed, this is worthy of the Trial Series which has already given us the historic trials of Mary Queen of Scots and Duchess of Kingston.—*K. C.*

THE INDIAN CONTRACT ACT, by Trikamlal R. Desai, B.A., LL.B. Edited by Sunderlal Trikamlal Desai, B.A., LL.B., Bar.-at-Law. 11th edition, 1928. Price Rs. 5-8-0.

This is a handy commentary on the Indian Contract Act with notes based upon the English and Indian cases, which has already run through ten editions. The editor has in the present edition carefully revised the book and the citations of cases are

brought down to July, 1928. The book is mainly intended for students and the analytical mode of treatment will be found very useful by them. At the same time, the practitioner will find in it the leading cases on the various points without being overburdened with the entire case-law. The printing and the get up of the book are attractive and we believe the present edition will enjoy the popularity of the previous ones.

DESAI'S ALL-INDIA COMPARATIVE TABLES, 1809 to 1927, by B. R. Desai, Vakil, High Court, Baroda. 1928. Price Rs. 15.

It is well known that there are a multitude of legal journals in this country reporting the decisions of the various superior courts and it is very common that the same decision is reported in a large number of journals. It is not possible for any but very few practitioners to have all the reports in their library. The present publication is under the circumstances almost a necessity in finding out where any case which is reported in some other journal is to be found reported in the journal which finds a place in the lawyer's library. It is therefore impossible to exaggerate the usefulness of this publication which will in most instances save the practising lawyer going in for an unnecessary multitude of legal periodicals.

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MADRAS LAW JOURNAL.

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LAW REPORTS*

American Reports.

By Article III of the Constitution of the United States of America, the judicial authority of the United States is vested in the Supreme Court and in such other inferior Courts as the Congress may from time to time establish. The jurisdiction of these Courts is confined to cases—

(1) arising under the Constitution.

(2) relating to the administration of the Laws of the United States.

(3) under Admiralty and Maritime Jurisdiction.

(4) in which the United States is a party.

(5) between two or more States.

(6) between citizens of two States.

(7) between citizens of the same State claiming under grants from two States.

(8) between citizens and foreigners.

In the case of ambassadors, consuls, etc., the Supreme Court itself has original jurisdiction. The United States are divided into Districts and each District has a District Judge. In addition, there are Circuit Courts presided over by Supreme Court Judges and other Judges known as Circuit Judges.

The Supreme Court consists of a Chief Justice and eight Associate Justices. There are nine Circuit Courts each consisting of a Justice of the Supreme Court and a Circuit Judge and 56 District Courts each with a District Judge. Each Circuit comprises several States. The Supreme Court Justices, in addition to their Circuit work, meet in Banc annually at Washington.

*The sixteenth of a series of lectures arranged by the University of Madras delivered by Mr. B Sitarama Rao, Advocate, Madras High Court.

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The Districts cover each a State or a part of a State. Appeal lies from the District to the Circuit Court when the matter involved is above 500 dollars and from the Circuit to the Supreme Court when the matter involved is 5,000 dollars and above.

In each State there are three grades of Courts—a Supreme Court or Court of Appeal, Superior Courts of Record and Local Courts. The names and the relations of these vary largely from State to State. Most of the original 13 colonies possessed separate Courts of Chancery after the English model and in this they were imitated by many of the earlier of the New States but special Chancery Courts now exist only in a few of the States in the east and south. In other States the Common Law Judges have also equity jurisdiction. In four States, New York, North Carolina, California and Idako, there has been a complete fusion of law and equity. In Colonial days, the Superior Judges were appointed by the Governors except in Rhode Island and Connecticut, where the legislatures elected them. These precedents were followed in all the early constitutions except in Georgia, where election by the people was established. During the democratising period (1812-1860) the system of popular election was extended specially in the new States and at present this system prevails in 32 States including practically all the new States and four of the original States, New York, Pennsylvania, Maryland and North Carolina. Five of the original thirteen have their Judges elected by the legislature, and in five others together with Maine, Mississippi and Louisiana among the newer States, they are appointed by the Governor, subject to the approval of the Executive Council of the Senate. Local Judges are generally chosen by the votes of the District in which they hold Court.

Originally, the Superior Judges were in most States appointed for life and held office during good behaviour but only four States now retain that system. Eight to ten years is now the average term; in New York it is 14 years; in Pennsylvania 21, but a Judge is always re-eligible. Salaries too are small in most States.

Popular election, limited terms and small salaries have all tended to lower the character of the judiciary. In not a few States the Judges are men of very moderate abilities and limited learning and are decidedly inferior to the best of the men that practise before them. The evils of popular election were best illustrated in New York, where one of the most celebrated Courts of America became a byeword for reproach during

the first years of the introduction of the new system and even now it can hardly be said to have regained its old dignity and position. In fact, there is a lot of complaint against the judiciary all over America, but it is said that in most of the States the Bench is respectable, while in some it is occasionally adorned by men of the highest character and eminence. Things would have become much worse but for the watchfulness of the Bar.

There is no appeal from the highest State Court except in those cases where a question of federal law is involved. In such cases the suit itself may be removed to the Federal Courts.

The source of the American Law is the common law of England. When the Governments of the several Colonies on the Atlantic Coast declared their independence in 1775 and 1776, they each adopted the common law of England as it then existed and had till then been administered as the common law of the land. For example, New York adopted the common law as it existed on the 19th April, 1775, as the law of the State. All English statutes and decisions in force on that day are a part of the common law of New York, except in so far as they may have been modified, repealed or declared inapplicable. Each of the original States did substantially the same thing and equally in the States since admitted the common law prevails by the action of the people except in case of Louisiana where the Code Napoleon forms the fundamental law. Many of the English statutes like the statute of Frauds, of Limitation, of Wills and of Charitable Uses have been substantially re-enacted in the various States. The decisions of the Courts of one State are not binding on the Courts of another State, nor for the matter of that the decisions of the Federal Courts, but they have developed a rule of comity which is making for uniformity. In addition to the common law of the States that is thus growing up, a common law of the United States based equally on the common law of the States and the common law of England is growing up by the action of the Federal Courts. Even a peace of the United States as distinguished from the peace of the individual States' decisions have come to talk of Prior to 1800 there were only one or two reports, and reporting went on much on the same lines as in England, but since then there has been a steady tendency towards official reporting so that to-day the reporters of the Supreme Court of the United States and of most of the State Courts of the last resort are public officials elected or appointed. In the State of New York, one of the Judges

themselves superintends the reporting work. In some of the States only such of the decisions are reported as are pronounced reportable by the Judges and some of the Courts prefer that their decisions should be cited only from the official volumes. Nevertheless there is no rule that only official reports could be cited in Courts. In one respect the rule is less strict than in England. In England, newspaper report of a case will not be allowed to be cited before any Court. Lord St. Leonards is reported to have said : "Every man is and must be left at liberty to go into Court and report what he pleases. The newspapers have and will continue to have that privilege. No Judge can properly refuse to hear a case quoted at the Bar, but a Judge would not allow a newspaper report to be quoted nor would he act upon an important decision quoted from a report hastily published and without further examination." In America, a Court will not refuse to listen to a newspaper report if none other is available though it would not generally be regarded as a satisfactory authority.

In fact, there are many reports of decisions of the Courts of last resort found in regular though unofficial series, others in legal journals and professional periodicals of various sorts. The National Reporter system organised by the West Publishing House of St. Paul, Minnesota, includes two periodicals devoted to the decisions of the various Courts of the United States called respectively the Supreme Court Reporter and the Federal Reporter and several other weekly issues each devoted to a group of States, bearing such geographical titles as the Atlantic Reporter, Pacific Reporter, etc. These contain very prompt reports of all the decisions of the Courts of last resort in all States, while the *New York Supplement* gives the decisions of the intermediate and inferior Courts of New York. As judgments are always written, in the matter of reporting the official reports have no special advantage over the other reports. In point of promptness, the official reports always lag behind the non-official reports. As the judgments are full, it is not usual in America to give either the facts or the arguments. Besides these, there are other excellent series of selected cases as well as those exclusively dealing with the decisions upon some major branch of the law, such as Railroads, Corporations, Bankruptcy, Insurance, Mining, etc. The number of independent jurisdictions and of reports necessarily presents great difficulties in the way of the practitioner and, in order to cope with these, private enterprise

produces a whole body of annotated reprints, digests and other apparatus of reference for which there is nothing analogous in England.

Lawyers' Reports annotated contain cases selected from the current decisions of the Courts of last resort of the several States as well as those of the United States Supreme and other Federal Courts. The series began in 1888 and comprises four volumes for a year. In 1906, when 70 volumes had been published, a new series was begun. American Decisions are a series of 100 volumes purporting to contain cases of general value and authority from the earliest State Reports up to the year 1869. The American Reports form the continuation of the American Decisions and comprise cases selected from 1869 to 1887 in 60 volumes. American State Reports continue the series still further and come up to 1911. The three series are styled in America as the Trinity. The American and English annotated cases began in 1906. They contain important cases selected from the current American, Canadian and English Reports. It has since merged with the American State Reports.

Fifty years ago, there was hardly any annotated report in the United States of America, but to-day it is difficult to find a case not annotated. Annotations are of various kinds and degrees. Some give only references to places where cases on the subject will be found collected; some show how the case has been subsequently dealt with, whether approved, dissented from or overruled; some give a collection of cases more or less on the point; some give an exhaustive collection of cases on the point, making an attempt to elucidate the principle involved in the case. The most complete one gives an exhaustive digest of cases indicating the principles involved and specially noting the best and reasoned cases on the subject. These annotations are classified in American terminology as annotations simply, annotations extra and critical. Extra annotations trace the judicial history of each case down through all later cases which have cited it.

The Reports of the Supreme Court of the United States began in 1790. From that time up to date we have regular official reports. Till 1875 they used to be named after the Reporters[1]. From 1875 the Reports are called United States Supreme

(1) Dallas (1790-1800), Cranch (1800-1815), Wheaton (1816-1827), Peters (1827-1842), Howard (1843-1860), Black (1861-1862) and Wallace (1863-1875).

Court Reports and they continue up-to-date. We have an extra annotated edition of these known as Lawyers' Co-operation Edition in 57 volumes. We have also condensations and selections like Peter's Condensed Reports (1790-1827), Curtis United States Decisions (1781-1854) and Miller's United States Supreme Court Decisions (1854-1862). These reports are of the highest authority and are cited with great deference all over America, even where the decisions are not binding. Circuit Court Reports are also cited with respect in America. The Reports of the First Circuit consisting of Massachussets, Maine, New Hampshire and Rhode Island begin from 1812[2].

The reports of the second circuit consisting of New York, Connecticut and Vermont start from 1810[3].

The circuits have been re-arranged in 1866. The old third circuit consisting of Pennsylvania and New Jersey has reports from 1781[4].

The old fourth circuit consisting of Virginia, Maryland and Delaware has reports from 1793[5].

The new fourth circuit reports are Taney's decisions by Johnson (1865-1869) and Hughes (1870-1880).

The fifth circuit (new) has its reports by Woods.

The sixth circuit (new) reports are Bond (1855-1871), Brown's Admiralty (1859-1875) and Flippin (1859-1877).

Seventh circuit (old) Maclean (1829-1884).

Seventh circuit (old and new) Bissel (1851-1878).

Eighth circuit reports are Miller's decisions, Woolworth (1863-1869), Dillon (1870-1880), and M'Crary and so forth.

The ninth circuit (old) reports are Hampstead (1839-1856).

The ninth circuit (old and new) has Macallister (1855-1859), Deady (1861-1869) and Lawyer (1870-1884).

From 1892 we have separate reports known as Circuit Court of Appeal Reports. The Circuit and District Courts are also reported by Abbott (1863-1871) and by the Federal Reporter from 1880. The various District Courts have also their old

(2) The reporters are Gelison (1812-1815), Mason (1816-1830), Sumner (1830-1839), Story (1839-1845), Woodbury and Minot (1845-1847), Curtis (1851-1856), Clifford (1858-1878), Holmes (1870 onwards) and Lowell (1865-1877).

(3) Paine (1810-1840), Blatchford (1845-1880) and so forth

(4) Dallas (1781-1806), Wallace 1801, Peters (1803-1818), Washington (1803-1827), Baldwin (1828-1833) and Wallace (1842-1862).

(5) Cell's Virginia Reports (1793-1825), Marshall's decisions by Brockenbrough (1802-1833) and Tancy's decisions by Campbell (1836-1861).

reports, some of them like the District Court of Pennsylvania having reports from 1779. In fact, Hopkinson's judgments in the Admiralty reporting the decisions of the District Court of Pennsylvania seem to be the earliest report in the United States of America. All the decisions of the Circuit Courts and District Courts and Circuit Court of Appeals up to 1879 from the very beginning in 30 annotated volumes have been published under the name of Current Reports. In addition to these, patent cases are separately reported in Robb's Patent Cases (up to 1850), Fisher's Patent Reports (1821-1850), Witman's Patent Reports (1810-1874), Patent Office Gazette and Patent Office Decisions, Banning and Ciroden Patent Cases. We have also certain reports known as Interstate Commerce Reports (1887-1913). Bankruptcy Cases are separately reported in National Bankruptcy Register (1867 up to 1880) and under the name of American Bankruptcy Reports, 1899.. In addition to these we have the American Law Times Reports of Leading Cases (1868-1873), Law Times Reports (N. S.) (1874-1877), Law and Equity Reporter (1874-1877) and the two last are continued by the Reporter 1878 onwards, which deal with the United States and State Court Reports. The Congress Election Cases from 1789-1876 are reported in a series known as Contested Election Cases (1789-1878). Other Reports dealing with special subjects are American Corporation Cases (1868-1887) and (1883-1906) and (1906-1914), American Criminal Reports (1877-1912), American Electrical Cases (1872-1908), American and English Railway Cases (1881-1896), N. S. (1896-1913), Street Railway Reports (1903, etc.), American Negligence Cases (1789-1896), (1896-1906), Negligence and Company Cases (1911-1913), Probate Reports (1877-1896) again annotated (1897 onwards), Railroad and Corporation Reports (1888-1896), Banking Cases (1900-1905), Morrison's Mining Reports (1883-1906) and Municipal Corporation Cases (1900-1904).

So far we have dealt mainly with the Federal Court Reports.

The New York Common Law Reports contain all the Reports of Common Law Courts till 1847 when the Civil Procedure Code was adopted. The New York Chancery Reports report the opinions of the old Chancellors. Each State has its own State Court Reports. Connecticut has reports from 1785[6]. Kentucky also has its reports from 1785[7].

(6) They are Kirby (1785-1788), Root (1889-1898), Day (1802-1818) and since 1814 we have the series known as Connecticut reports.

(7) Hugless (1785-1801), Sneed (1801-1805), Hardin (1805-

There is also a report known as Kentucky Law Reporter.

Louisiana has reports from 1809[8]. Massachussets from 1804[9]. Michigan from 1836[10].

New York has the largest and most varied kind of reports which are some index also to their importance. There are separate reports for Law, Chancery, Common Plea Practice and Criminal Cases and for Court of Appeals. For Supreme Court we have Barbour's Supreme Court Reports (1847-1877), Lansingh's (1869-1873), Thompson and Cook's (1874-1875), Hun's (1874-1895) and Hun's Appellate Decision (1896 onwards). The Inferior Court Reports appear from 1888 in the *New York Supplement*. Pennsylvania has also an equally respectable record. The Supreme Court Reports of that State date from 1754[11].

In addition to these we have reports of various inferior Courts like County Court Reports, District Court Reports, Recorder's Decisions, Election Cases, Reporter and various other legal journals.

New Jersey is another State which has valuable reports from early times. It has separate reports for Law and for Equity. The Reports at Law begin from 1790[12]. The Chan-

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1808), Bibb (1808-1817), Marshall (1817-1821), Littel (1822-1824), Monroe (1824-1828), Marshall (1829-1832), Dane (1833-1840), Monroe (1840-1857), Metcalfe (1858-1863), Duvall (1863-1866), Bush (1866-1879), and Kentucky from 1879 onwards.

(8) Martin (1809-1823), Martin (N.S.) (1823-1830), Louisiana (1830-1841), Robinson (1841-1846), Louisiana Annual (1847), Louisiana Reports 1901.

(9) They are Massachussets (1804-1822), Pickering (1822-1839), Metcalfe (1840-1847), Cushing (1848-1853), Gray (1854-1860), Allen (1861-1867), and Massachussets Reports from 1867 onwards.

(10) Harrington Chancery (1836-1842), Walker's Chancery (1842-1845), Douglas (1843-1847) and Michigan reports from 1847 onwards. There are also Nisi Prius Decisions, such as Brown's Nisi Prius (1869-1871) and Prius.

(11) Dallas (1754-1806), Addison (1791-1799), Yeates (1791-1808), Binney (1799-1814), Seargeant and Raule (1814-1828), Raule (1828-1835), Wharton (1835-1841), Watts and Seargeant (1841-1845) and State Reports (1844 onwards).

(12) Coxe (1790-1795), Pennington (1806-1813), Southand (1816-1820), Halsted (1796-1804, 1821-1831), Green (1831-1836), Harrison (1837-

cery Reports date from 1830[13]. Maryland is another old State having reports from very long time—from 1658. New Hampshire has them from 1816 and Ohio from 1821. South Carolina also has separate Reports at Law and at Chancery. Law starts from 1783 and Chancery from 1784 and continue up to 1868. From that date a new series under the name South Carolina Reports commence and are running up-to-date. North Carolina has reports from 1778. Georgia has reports from 1805, Illinois from 1819, Indiana and Maine from 1820. Each of the other States has its own reports each from the date of its admission or formation. Alabama from 1820, Alarka from 1867, Arizina from 1866, Arkansas from 1837, California from 1850, Colorado from 1864, Dakota from 1867, Delaware from 1832, Florida from 1846, Idaho from 1866, Indiana and Texas from 1896, Iowa from 1839 and Kansas from 1862.

Virginia has reports from 1730[14] and Virginia reports from 1886. Vermont has reports from 1789, Chipman from 1789-1791, Chipman (D.) from 1789-1825, Taylor from 1800-1803, Brayton from 1815-1819, Arken from 1825-1827, Vermont from 1826, Michigan from 1836, Minnesota from 1851, Mississippi from 1820, Missouri from 1821, Montana from 1868, Nebraska from 1854, Nevada from 1865, New Mexico from 1852, North Dakota from 1867, Oklahoma from 1870, Oregan from 1853, Philippine Island from 1898, Porto Rico from 1805, Rhode Island from 1828, South Dakota from 1867, Texas from 1840, Utah from 1871, Washington from 1854, West Virginia from 1863, Wisconsin from 1839 and Wyoming from 1870.

This short survey of the reports is sufficient to give an estimate of the magnitude of the American reports and we that have begun to complain of the multitude of reports in India can realise the

1842), Spencer (1842-1846), Zabritkie (1847-1855), Dutcher (1855-1862) and Vroons (1862 onwards).

(13) They are Saxton (1830-1882), Green (1832-1846), Halsted (1846-1853), Stockton (1852-1858), Beasley (1858-1860), McCarter (1861-1862), Green (1862-1876), Stewart (1877-1885), Dickinson (1889-1905), Nobbins (1905-1908) and Buchanan 1909 onwards.

(14) Jefferson (1730-1772), Wyther Chancery (1790-1799), Virginia Cases Criminal (1789-1826), Washington (1790-1796), Call (1797-1825), Hening and Minford (1806-1810), Minford (1810-1820), Gilmer (1820-1821), Randolph (1821-1828), Leigh (1829-1842), Robinson (1842-1844), Grattan (1844-1880), Virginia Reports from 1880.

difficulties of the American Practitioner. Life of a practitioner becomes tolerable only by the existence of the numerous digests, select cases and annotations and other labour-saving apparatus which give at a moment's notice in one place a more or less complete list of decisions of cases on a given point more or less scientifically arranged differentiating the reasoned cases on which the practitioner might count at the time of the argument.

These reports do not all bear the same authority. The decisions of the Supreme Court of the United States are binding on all the inferior Federal Courts and are to be preferred by those courts when they are in conflict with the decisions of the other courts on any question. The State Courts including the Supreme Courts are equally bound by the decisions of the United States of America on all questions relating to the constitution of the United States, or the validity of the Acts of the Congress. On questions of the construction of the Acts of various State Legislatures or on questions of local law, the Supreme Court of the United States feels itself bound by the decisions of the States from which the cases come though the inferior Federal Courts are bound to follow the decisions of the Supreme Court till recalled by that Court itself. Even on those questions, the opinion of the United States Supreme Court or even of the Circuit Courts is received with great respect by the State Courts and, if not in conflict with their own decisions, is followed. Upon questions of general common law and upon such other subjects as depend upon general principles rather than on any local regulation such as a doctrine of criminal law or a rule of evidence, the decision of the Supreme Court has equal weight with the decisions of the Courts of last resort of each State, though the Courts generally follow their own precedents in preference to those of United States Supreme Court. As between co-ordinate Courts the rule of comity is not followed with the same strictness as in England as was to be expected from the multiplicity of Courts and the necessary difference in the intrinsic authority of the judgments of the various Courts. They equally with the English Courts regard the so-called rule of comity "as something more than mere courtesy which only implies deference to the opinion of others", but the obligation to follow is not considered imperative, for if it were otherwise, says the same authority, "the indiscreet action of one Court might become a precedent increasing in weight with each successive adjudication until the whole country is tied down to an unsound principle." With them "it declares not how a case

shall be decided", but "how it may with propriety be decided". Greater respect is paid to a course of decisions than isolated decisions. Much more deference is paid to the decisions of certain courts and certain Judges than those of others, and again greater deference is paid to the decisions of certain Courts on certain points than on others. The relative standing of various Courts and even the strength of the same Court at different times varies. A Judge of exceptional ability sometimes adorns and dignifies a Court, otherwise mediocre and common place, for example, Judges Cooley and Campbell of the Supreme Court of Michigan, or Judge Greene of the Supreme Court of Appeals of West Virginia, whose decisions carry great authority. Some Courts are always of commanding authority, *e.g.*, the Supreme Court of the United States. The Judges are usually men of first-rate ability and character. Chief Justices Marshall and Tuney and Justices Miller, Bradley and Story are pre-eminent. Some of the Judges of the Circuit Court of Appeals also speak with the greatest authority, for instance Blachford on Patents and Judge Dillon on Corporations. The Federal Reporter and the decisions of the Circuit Court of Appeals are cited with respect throughout America. Among the State Courts the decisions of the Court of Appeals of New York and the Supreme Court of Massachussets have the greatest currency and authority in the other States To the decisions of Chief Justices Parsons and Shaw of Massachussets, Courts have always attached very great weight. The New Jersey Law Reports and New Jersey Equity Reports also are specially valuable. The Pennsylvania report is of unequal merit, but Chief Justice Gibson of the Court is spoken of with the greatest respect. Among the older Judges of that State, Shearwood, Black, Doodward and Paxson were conspicuous. The decisions of the Supreme Court of Louisiana are considered of special authority on commercial questions, of California and Colorado on Mining Law, of Kentucky on title to land. The Supreme Court of Appeal of Virginia, South Carolina and Arkansas prior to Civil War were able Courts. The decisions of Maine, Connecticut and Wisconsion are also generally of respectable authority. Vermont, New Hampshire, Georgia, Tennessee, Ohio, Missouri, Indiana and Texas are not of high authority generally.

The principle that precedents may become obsolete by reason of change of circumstances or unsuitability to the new conditions is applied much more freely in America than in England though the principle is not altogether ignored in England also.

For instance, Chief Justice Willes said in a case "Where the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable it was because they were kept principally for pleasure and not for profit and were not sold and turned into money as they are now, the rules concerning personal estates which were laid down when personal estates were but small in proportion to lands are quite buried both in Courts of Law and Equity now that personal estates are so much increased and become so considerable a part of the property of this kingdom." The opportunities for applying the rule are naturally not so great in England as in America where the Courts have had to consider from the beginning as the Indian Courts had to—how far the Common Law should at all be applied to the widely differing circumstances of the American society. The American Law is the residuum left after such process of elimination and should be particularly useful in India, the physical and climatic conditions of India being in many respects similar to those of the United States of America. Owing to differing physical conditions the English rule as to riparian rights has been abandoned in some of the States in favour of the rule of prior appropriation. Similarly the English rule-making navigability depend upon ebb and flow has been abandoned and instead navigability in fact has been made the test. This rule has been adopted, it will be found, in India. The rule of English Law against sale of minor's real property has been rejected on the ground that the basis of the rule, *viz.*, different lines of inheritance apply to different kinds of estate not being recognised in America, the rule itself has been held inapplicable. Similarly in several of the States and by the Supreme Court of United States it has been held that the rule of common law making the cattle owner liable for trespass though the land is unfenced is considered so ill-adapted to the condition of America and in conflict with the practice that it is not recognised. . Again, the English Common Law is very strict as to cutting down of timber. The rigor of this rule has been much relaxed in America as was to be expected in a new country where land is very much more valuable without timber than with it. So again, the Supreme Court of Kansas has refused to recognise "such indescribable myth" as it calls "as vendor's liens." The market overt doctrine has also been held inapplicable to American conditions. Louisiana and some other States has also repudiated the common law doctrine that a boy under the age of 14 years could not commit rape on the ground of racial and physical differences.

This habit of constantly eliminating has made them more bold than English lawyers in rejecting old doctrines, for instance, the Supreme Court of Alabama has rejected the test of insanity laid down by English cases on the ground that it is inconsistent with the latest researches. The Massachussets Court has rejected the doctrine of identity by which a person is held disentitled to recover damages if the driver of his vehicle is contributory to the negligence of the defendant on the ground that it has become inapplicable by reason of business evolution.

Before applying the American precedents, one must make sure that the particular ruling is not the result of the peculiarly American conditions which might be different from the Indian conditions. The other troublesome factor about these decisions is the existence of numerous varieties of procedure and legislative enactments in that country and reliance on the conclusion itself without a preliminary enquiry into the conditions existing in a particular State in respect of these matters must be unsatisfactory. The means open to an ordinary practitioner or the Court of making such an investigation are in the highest degree limited. The Procedure, for instance in several of the States has been codified. New York has the distinction of producing the first code on the subject and the Indian Civil Procedure Code has taken many of its provisions from that Code. Connecticut has adopted the English Rules in 1879, New Jersey in 1912, and others have done more or less the same. The Procedure in some of the Courts however retains the old English character with reduplication of Courts, errors, re-hearings and bills of exceptions. Where there are Codes, it is said, they go into too many particulars leading to much inelasticity. Commercial Law has been codified in most of the States, California leading the way in 1869. But New York still retains the old Negotiable Instruments Law as it stood before the Bills of Exchange Act. The diversities in the law, in the jurisdictions and in the procedure are naturally most tantalising to a stranger to the system and add to it the insular prejudice, there is naturally considerable disinclination to cite American Cases in England. In India, Mr. Justice Subrahmania Aiyar began the practice of citing American precedents and it was continued by Justices Mukerjee, Das and Sundara Aiyar. It has received a set-back by the decision of the Privy Council in *Imambandi* v. *Mutsaddi*[1]. A writer in an American Journal in 1914 made a calculation of the American citations from 1876 to 1914 and has been able to find 251 citations from cases and 106 from

1 (1918) L.R. 45 I.A. 73 · I.L.R. 45 C. 878 : 35 M.L.J. 422 (P.C.).

American text-books, Lord Esher having to his credit 30, Lindley 18, Watson 14, Kennedy 12, Halsbury and Blackburn each 10. Marshall, he says, goes in for the largest praise, Story and Kent comes next, and Holmes also is spoken of with respect. References to recognised American text-books are less objectionable as generally the local peculiarities are likely to be noted there supplying the necessary corrective. Certain branches of law are much better developed in America than in England or at any rate it may be confidently said that we get better text-books on certain subjects there than you do in England and seeing that the methods of the writers in England and America do not vary, it is not a violent inference to make that the subjects have either come before the Courts oftener in America than in England or that they have received more elaborate treatment. For instance, the subjects of subrogation, jurisdiction, corporations and void judicial sales have received more attention in America than in England and it is but sheerest prejudice that could insist upon our shutting our eyes to light that might come from that quarter.

SUMMARY OF ENGLISH CASES.

CALOW *v.* CALOW, (1928) 1 Ch. 710.

Will—Construction—Contract for sale of part of devised land—Completion of sale subsequent to testator's death—Sale proceeds if pass under specific devise or residuary gift.

Where, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it. This rule applies where the testator has not limited the devise to the specific property the subject of the contract.

JENKINS *v.* JENKINS, (1928) 2 K. B. 501.

Promissory note—Payee appointing one of the joint and several makers of the note as executor—Action by the executor after the payee's death on the note against the co-makers—Maintainability.

Where the payee of a joint and several promissory note appointed one of the makers as executor under his will, and,

after the death of the payee (testator) probate of the will was obtained by the executor, and the executor brought an action on the promissory note against the co-makers of the note,

Held, that the action could not be maintained either at common law or in equity, for, in common law the debt was released on the death of the testator, and in equity the debt must be deemed to have been paid to the executor as such on the date of probate.

MORE *v.* WEAVER, (1928) 2 K. B. 520.

Defamation—Absolute privilege—Communications between solicitor and client.

The defendant had lent money to the plaintiff to enable the latter to purchase and carry on a hotel. Subsequently differences arose between them as to what security should be given for the loan and as to the time when the loan should be repaid. The defendant consulted her solicitors and wrote certain letters to them which had reference to the business capacity, character and financial position of the plaintiff. The plaintiff instituted the present action for damages on the ground that these letters contained defamatory statements about the plaintiff.

Held, that the communications between the defendant and her solicitors were absolutely privileged and the action must fail.

THE HARKAWAY, (1928) P. 199.

Shipping — Negligence — Anchoring in shallow river without a buoy or warning.

It is negligence on the part of a shipowner to leave an anchor in a shallow navigable river without a buoy or some other warning.

H. *v.* H., (1928) P. 206.

Divorce—Decree for judicial separation—Subsequent domicil in a foreign place—Wife's petition for dissolution of marriage in original country—Jurisdiction of Court.

At the instance of the wife, a decree for judicial separation was pronounced on the ground of desertion in England

which was the domicil of the parties. Subsequently, the husband went away to France and lived there. The wife petitioned in England for dissolution of marriage on the ground that the husband lived in adultery in France. The husband appeared under protest and contended that he had domiciled in France and therefore no decree for dissolution could be passed in England.

Held (1) that the jurisdiction to decree dissolution of marriage depended upon the domicil of the husband at the commencement of the proceedings and independent authority to dissolve the marriage could not exist in two Sovereign States simultaneously,

(2) that the husband by deserting his wife in one domicil would not be estopped from asserting another domicil which he acquired subsequently and the wife would not thereby become entitled to determine the forum of proceedings for dissolution, and

(3) that the decree for judicial separation did not from its date stereotype the matrimonial domicil or render it incapable of alteration without the consent of the wife.

KEYSTONE KNITTING MILLS TRADE MARK, *In re* : 97 L.J. Ch. 316.

Trade Mark—Legal proceedings for removal from register—Proceedings begun before, but motion heard after, seven years—Effect—Trade Marks Act, S. 41.

The expression "all legal proceedings" in Section 41 of the Trade Marks Act is intended to denote every kind of legal proceeding including an application for the rectification of the register of trade marks. The expression is not used to denote the steps in a legal proceeding but the legal proceedings themselves.

The crucial date which determines whether a particular legal proceeding is a proceeding in which, according to Section 41, the trade mark is to be taken to be valid, is the commencement of such proceeding and the section does not apply to any legal proceeding commenced before the expiration of the seven years' period although the actual hearing takes place after the expiration of the seven years.

FORD, *In re* : THE TRUSTEE *v.* RESTELL, BROWN & CO., *Ex parte*, 97 L. J. Ch. 334.

Bankruptcy—Reputed ownership—Custom to deliver goods to dealer on approval—Bankruptcy Act, Section 38 (*c*).

Where a trade custom was proved to exist in the antique furniture trade to deliver goods to a dealer on approval and goods were found upon the premises of one of such dealers who was adjudicated a bankrupt,

Held, that the goods could not be said to be in the bankrupt's possession so as to make him the reputed owner thereof within the meaning of Section 38 (*c*) of the Bankruptcy Act.

In the Matter of THE PETITION OF A. B., 97 L. J. P. 104.

Practice—Hearing in camera—General law.

The general law of England is that the Courts exercise their powers in public, unless by some means they are directed to exercise them otherwise.

Where a question of mere status is concerned, it is essential that there should be publicity as a general rule; a question of status does arise where the question is as between legitimacy and illegitimacy.

It is not the law that, if publicity may deter a litigant from proceeding to obtain redress, there may be a suit *in camera* on his behalf.

JOTTINGS AND CUTTINGS.

Lord Birkenhead on Divorce.—The new weekly journal *Britannia*, under the direction of Mr. Gilbert Frankau, contains the first instalment of a discussion by Lord Birkenhead of "The Cruelties of Divorce." Lord Birkenhead has shown by his speeches in the House of Lords the interest which he takes in the subject, and his object is to reconcile the principle universally accepted in this country, that marriage should be monogamous and life-long, with the right of dissolution where its continuance becomes unjust. "A law which prevents the dissolution of marriage in cases where for the most cogent reasons of the interests of society such a union ought to be terminated is a law both cruel and unjust." He instances the refusal of annulment where the woman is, unknown to the husband, pregnant at the time of marriage by another man;

and the case of incipient lunacy, concealed by the wife's relations, developing after marriage. The modern discussion of the grounds of divorce began with the late Lord Gorell's famous judgment on the evils of separation orders in *Dodd* v. *Dodd* (1906, P. 189). On this followed the Royal Commission on Divorce, of which he was Chairman, and before which he laid the comprehensive statement of the Principles of Divorce Legislation which is reprinted at the end of his *Life* by Prof. De Montmorency. On the Reports of the Commission—Majority and Minority—little has been done, but the cheapening of Divorce Procedure has led to a great extension of divorce in practice. Lord Birkenhead's contribution to the discussion of the subject is opportune and welcome.—*L. J.*, 1928 p. 194.

Disappearing Ex-Lord Chancellors.—If, as appears all too probable, Lord Birkenhead "goes into the City," the judicial strength of the House of Lords and of the Privy Council will be still further and greatly impaired, and at a time when the two final Courts of Appeal are in need of every available man. Of the ex-Lord Chancellors, who are left ? Gone are Lord Haldane and Lord Birkenhead ; so far as our own Appellate Courts are concerned, Lord Finlay is no more. Lord Buckmaster, great judge though he is, appears to be devoted to the enfranchisement of the unhappy women and men who chafe under the matrimonial yoke. Lord Oxford, who might have been Lord Chancellor, and who was qualified to sit on the Judicial Committee, he also is gone.

It follows that the six Lords of Appeal in Ordinary who are paid six thousand a year for their services, will have to work harder than ever for their salaries, relying on the voluntary and distinguished help of those who, like Lords Reading, Wrenbury, Darling, Warrington and Phillimore, who have in their time filled high judicial office.—*L. J.*, 1928, p. 232.

The Gift to Harvard.—We note with interest that Mr. Chester D. Pugsley, a New York banker, has given 100,000*l.* to the Harvard Law School to establish scholarships in International Law. The gift appears to have been suggested by the Rhodes Scholarship Fund, and it is proposed to establish

a scholarship for each nation of the world, and also for the self-governing British Dominions. The details of the scheme are not available, and are probably not yet settled, but the Harvard Law School is to be congratulated on this act of munificence, and the study of international law throughout the world should be greatly benefited. Everything that encourages such study tends to better understanding between nations, and helps the cause of Peace, on which men's desires are fixed. Of the numerous Law Schools which the United States possesses, Harvard is one of the earliest, and is the most famous. It celebrated its centenary in 1917. One of its earliest professors was Judge Story, whose works on Equity and the Conflict of Laws are still standard authorities. A famous professor of later days was Christopher Columbus Langdell, who in 1870—a pioneer, as his name forecast—started the Case-System of teaching, which has since been a leading feature of American legal training. Others—Thayer, Gray, Ames—have been equally famous over the water, though it is only the late Prof. J. C. Gray, whose name, on account of his work on Perpetuities, has become familiar to practising lawyers here. Enthusiastic as the study of the law has become in this country, it is no less enthusiastic in the States, and Harvard will make good use of Mr. Pugsley's endowment.
—*L. J.*, 1928, p. 256.

An Old Thing Passed Away.—There is, in the record of the life of Lord Truro, a description of the old ceremony of counting a serjeant-at-law on his admission to the order. It was the duty of the newly-made serjeant to appear in the Court of Common Pleas and there read a "count" in an action of dower. When Martin, B , be came a serjeant the following procedure took place. Martin, B., recited from a document that Ann Ring, widow, by John Jones, her attorney, demanded against Charles Davies the third part of ten messuages, ten barns, etc., in the parish of Ripon, in the County of York, as the dower of the said Ann Ring, of the endowment of William Ring, deceased, theretofore her husband, of which she had nothing.

Thereupon the senior serjeant in Court, Serjeant Channell, demanded that the writ of dower should be read. Serjeant Byles, the next in seniority, remarked: "I imparle." The

L. C. J. then observed : "Be it so. Brother Martin, do you move ?" Brother Martin said he did not, and all was over.

The only ritual of the kind which survives in our unpicturesque day is the admission within the Bar of newly appointed leaders.—*L. J.*, 1928, p. 266.

"*The Overcrowding of the Bar*".—*Truth*, of October 24, points out that more students sat at the Michaelmas Bar Final than ever sat before, and suggests that "if this increase goes on there will be more men called to the English Bar each year than the whole Bar of Ireland, and two or three times as many as the whole Bar of Scotland". But, as the writer also says, the English Bar is an Imperial one, and of the 400 men called each year, probably 300 intended to seek their fortunes in India, the Colonies, or the public service. "All the same, the odd hundred left over are at least treble the number who can hope to succeed by practice in England," with the result that "there is no profession in the Empire so distressed with poverty and disappointment as the Bar". Such is the conclusion of the writer—who then proceeds to castigate the Benchers of the Middle Temple for "using the funds provided by Lord Rothermere for its relief to add to its misery by bringing impecunious young men of second-rate ability from Oxford and Cambridge, as they are doing, to increase the numbers of the indigent".—*L. J.*, 1928, p. 277.

A Matter for the Bar Council.—A correspondent, referring to *Truth's* remarks, writes : "I am not prepared to follow *Truth* in its criticisms of the Benchers of the Middle Temple, who are quite well able to manage their own affairs. But there is, unfortunately, only too much truth in the reference to poverty and disappointment at the Bar. I think that matters are moving steadily in the wrong direction, and that the time has come when the proper authority should deal with the growing congestion as regards the numbers of barristers trying to earn a precarious livelihood on the one hand, and the steady decline in available work on the other. The causes of this decline are notorious, and should be faced boldly and fearlessly by the only body competent to deal with them as representing the Bar—to wit, the General Council of the Bar. Why that august body is allowed to slumber on in

apathetic contentment whilst the present situation is moving from bad to worse we do not profess to understand. One of these days I fear there may be a rude awakening. What is most wanted, by way of preliminary, is a considered statement of the present position and of the causes which have led up to it. The amount of work available for the Bar cannot be gauged by looking at the High Court lists—significant though they are. The tremendous loss of criminal work on circuit due to recent legislation enlarging the powers of justices is an example of what one section of the Bar has had to face in recent years, and there are other sources of trouble that need to be plainly stated if the general question is to be properly understood." We do not at present feel called upon to express an opinion on the matter, but we commend these remarks to the Bar Council and influential members of the Bar.— *L. J.*, 1928, p. 277.

Suppression of Names.—Recent cases in which witnesses have been allowed to remain anonymous for various reasons have aroused some comment, and seem to show that in some quarters the principles on which a Court should act, in deciding whether or not to allow a witness's name to be suppressed, are being misunderstood or forgotten. Although *Scott* v. *Scott* (1913, A.C. 417) deals with the jurisdiction to hear a particular class of civil proceeding *in camera*, the principles which are enunciated in its judgments will, if applied to the question of whether a witness in a criminal case should or should not be required to disclose his or her name and address, enable a correct conclusion to be reached. Shortly, it may, we think, be said that anonymity may be allowed only where the Court is satisfied that the case is one in which, or is of a class in which, the due administration of justice, as distinct from the personal interests of the witness, will probably suffer if the name is disclosed. In case of blackmail, for example, it is plain that the publication of the names of persons who have put themselves in a position which makes them the subject of blackmail will tend to discourage such persons from invoking the protection of the law; and it is, therefore, necessary, in the general public interest, that names should not be given. But this class of case stands very nearly, if not entirely, alone; and it is to be hoped that a perfectly natural desire to spare a witness whose position is difficult or

painful will not be allowed to over-ride the principle that justice is to be administered in public ; this principle is *pro tanto* infringed where the identity of any party or witness is concealed.—*L. J.*, 1928, p. 277.

A Cabman's Revenge.—Once only in modern times has there been a public outcry against a County Court Judge. This was in 1874, when one of the Welsh Judges found himself compelled to resign after an address relating to his conduct had been presented to the Lord Chancellor. The incident which immediately gave rise to this step was curious. The Judge was driving to Court when he met a cab. The cabman being, as the Judge alleged, on the wrong side of the road, and refusing to get out of the way, His Honour struck the cabby with his whip.. Thereupon the indignant cabman summoned the Judge for assault.

On the day of hearing, the Judge, who was also a magistrate, appeared on the Bench, and espying the cabman said as follows: "I sentence you to imprisonment for seven days at Mold. You interrupted me when I was coming to the Court, and by Act of Parliament I have power to send you to gaol without evidence or any enquiry whatever." In alarm the magistrates' clerk intervened, only to be told that if he opened his mouth again he also would be sent to prison. At this juncture the Chairman appeared, and the case having been called on, the Judge was fined £5.

A few days later a public meeting was held, at which Mr. Watkin Williams, Q.C., M.P., moved that an address be presented to the Lord Chancellor. The motion was carried, and shortly afterwards the Judge resigned on the ground of illhealth.—*L. J.*, 1928, p. 286.

Additional Appeal Judges.—In the King's Speech at the opening of Parliament on Tuesday, it was intimated that a Bill would be introduced authorizing the appointment of two additional members of the Judicial Committee and also of an additional Lord of Appeal. The proposal to increase the numbers of the Judicial Committee repeats the efforts which have been made in this direction for the last two years, and which we have strongly supported. The necessary Bill has passed the House of Lords, but has failed to get through the Commons,

This year the measure is, it appears, to be introduced in the House of Commons first. The proposal to appoint an additional Lord of Appeal is new, and will bring the number of the ordinary Law Lords up to seven. Then, of course, the Lord Chancellor and any ex-Lord Chancellors should also be available, at any rate if they are in receipt of pensions. In spite of the difficulties and disappointments consequent on separate and often dissentient judgments, the judgments in the House of Lords are the most interesting, as well as authoritative, of our modes of judge-made law. They are of quite a different style from the single judgment in the Judicial Committee, and the Law Reports would be much the poorer without, for instance, the judgments of Lord Macnaghten.—*L. J.*, 1928 p. 295.

The Judge and the Statute.—Of the many wonders of our legal system, perhaps the way of a wise judge with a bad statute is the greatest and the best. The most modern example was provided in the Court of Criminal Appeal on Monday, in the case of *Rex* v. *Laws*. Avory, J., at the trial, had noted and lamented that strange anomaly in the Criminal Law Amendment Act of 1922, whereby the defendant, in a charge of indecent assault, was unable to put up the defence of reasonable cause of belief as to the age of the girl, although that defence would have been available for him if the charge had been the much graver one of carnal knowledge.

The L. C. J., Swift and Acton, JJ., heard the appeal. "The Court," said the Lord Chief, after referring in suitable terms to this statutory oversight, "cannot alter the statute; but it can deal with the sentence"; and their Lordships proceeded to do so by reducing the sentence from four months' to one day's imprisonment.—*L. J.*, 1928, p. 307.

What Judges Might Do.—This power of the judges to make the sentence conform with their views, not only of the gravity of a crime, but with their views of what the legislators ought to have said, opens a prospect of exciting speculation which loses its thrill only when one remembers the wisdom and mental sobriety of the English Bench. For, disliking, as so many of them must do, the Parliamentary estimates of right and wrong, what doth hinder them from so agreeing

together in this matter of sentences as to make certain parts of the Criminal Law a dead letter? Such (and other) powers they have that, were they to abuse them, there is hardly any limit to the excitement and general disorder which might ensue.

Suppose they utilised the aforesaid powers, or some or any of them as a means to enforce their right to increased wages? But we know instinctively they never will. It is beyond the power of any man to instil into their august minds these revolutionary ideas. They will go on trying to make sense of the unintelligible statute; they will continue to help the Legislature.—*L. J.*, 1928, p. 307.

A Seventh Lord of Appeal.—Apparently the Government is aware of the necessity of strengthening the Court of Appeal, and in addition to the two Colonial Judges who were to have been made a year ago, a seventh Lord of Appeal in Ordinary is to be appointed; so the perfect number will be reached. The first two were created under Sec. 4 of the Appellate Jurisdiction Act of 1876; two more, by the gradual and curious process set forth in Sec. 14 of the same Act, whereby one was appointed on the death of two of the paid judges of the Judicial Committee. The Appellate Jurisdiction Act of 1913 authorised His Majesty to appoint two more; and now another Act is needed before the purpose declared in the King's speech can be accomplished.

Already speculation is rife as to the person to be chosen for the filling of this high judicial office. It would be comparatively easy to indicate the best, but extremely hazardous and difficult to foretell the winner of this important event.—*L. J.*, 1928, p. 307.

The Advance of Legal Women.—Remote and fantastic-sounding are the echoes of the loud laughter which, not so very long ago in time, greeted the sallies of that M. P. who pictured the woman Speaker, the woman Premier, and such-like screaming absurdities. For now we learn that there is a grave possibility of a woman Attorney-General in Mr. Hoover's administration. Men must acknowledge that nothing is impossible with women, and male-mockers are few and insignificant.

Meanwhile, in England, the legal women are advancing slowly. Miss Geikie Cobb has for some time, in addition to her work as Counsel, discharged judicial functions as chairman of Courts of Referees in the Metropolitan area. It is said that the Home Secretary is anxious to appoint a woman stipendiary before the sands of his ministerial time and opportunity have run out; and from that point it is easy to visualise the woman County Court Judge. Meanwhile some three hundred males, of the silk and of the stuff, are said to be on the waiting list for the next appointment to the County Court Bench.—*L. J.*, 1928, p. 307.

BOOK REVIEWS.

THE LAW OF PROMISSORY NOTES, by T. R. Venkatesa Aiyar, B.A., B.L., Advocate, High Court, Madras. Second edition, 1928. Price Rs. 4-8-0.

Of the various kinds of negotiable instruments, the promissory notes are undoubtedly the most common in this country and this book which gives exhaustive commentaries on the provisions of the Negotiable Instruments Act as applicable to promissory notes will therefore be found useful. The author has given references to the corresponding provisions of the English Bills of Exchange Act and the decisions both of the superior courts of this country and England. This book is one of practical utility as it will save the busy practitioner a great deal of time in going through the digests.

THE LAW OF IDENTIFICATION, by Nripendra Nath Dhar. Published by M.C. Sarkar & Sons, Calcutta. Price Rs. 2-8-0.

The scope of this work can be judged from the variety of subjects dealt with in it. It is divided into four books, the first book deals with identity of persons ; under this head the author deals with mistaken identity, disputed identity and personal disguisement. He then deals with the evidence of identity, such as family resemblance and physical characteristics. There are also portions of the book dealing with handwriting and finger prints. There is another chapter dealing with the identification in cases of murder, infanticide, poisoning, drowning, hanging and strangulation. The second book deals with the identification of things; and under this head questions

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THE TRANSFER OF PROPERTY ACT AMENDING BILL—III*.

Clause (53) of the Bill provides for service of the "notice to quit" on the tenant by post also. This is in accordance with the decisions. Under S. 27 of the General Clauses Act such service will be deemed to be sufficient if it is by registered post pre-paid and it will be presumed unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post. The only difficulty that may arise as regards the actual date of service is where the tenant deliberately postpones taking delivery of the registered letter. Even in such cases it should be provided that the letter must be deemed to be served at the earliest time when the letter would have been delivered in the usual course of post. It is desirable to make the point clear expressly as the validity of the notice is dependent on the time given.

Clause (54) provides for compulsory registration of all leases except leases from month to month or for any term not exceeding one month. It also provides that an instrument of lease should be executed by both, lessor and lessee. The power of the Local Government to exempt particular leases from compulsory registration is however preserved. We do not think that it is necessary to make any changes in the old section 107. The clause providing for compulsory registration even in the cases of leases for less than a year is an unnecessary hardship especially in the case of leases of dwelling-houses in towns, which form a large class of such transactions. Again there is no case made out for insisting on the execution of the lease by both, lessor and lessee. In this part of India at any rate the general practice is only to have a rent deed executed by the lessee, the

*The First and Second Article on the Bills appeared in 54 M.L.J. 93 (Journal) and 55 M.L.J. 33 (Journal).

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same being delivered to and accepted by the lessor. The Full Bench decision in *Syed Ajam Sahib* v. *Ananthanarayana Aiyar*[1] is sufficient authority to justify the validity of such a lease. There is no necessity to modify an existing usage which has not been found to involve any particular hardship. Even if the changes proposed should be accepted, we do not see why the rest of the old section 107 should be altered. The clause about the other kinds of lease of immoveable property should be retained as the first portion of the proposed new section still provides for some exceptions.

Clause (55) of the Bill deals with the right of a tenant to remove all things which he has attached to the earth. The Indian Law has in this instance differed considerably from the English Law. The general maxim of the English Common Law *Quicquid plantatur solo cedit* has had from the beginning only a limited application in India. The rules of Hindu and Mahomedan Law on the point are more liberal to the tenants and other persons who have made improvements, etc., on the lands of others. The Transfer of Property Act, section 108, clause (*h*) has simplified the rules and abolished the distinctions of English Law as regards what are fixtures and what are not and the differences in rights according as the tenancy was for trade purposes or agricultural purposes and so forth. The new clause proposes to permit the tenant to remove the fixtures so long as he is in possession and not afterwards even after the determination of the lease. It does not seem to be a satisfactory solution to confine the rights of the tenant only to the period of his actual possession. Even under the existing law as settled by the decision of the Privy Council in *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury*,[2] the tenant will be entitled to a reasonable time for such removal even after the termination of the lease. The proposed alteration would in some cases operate to deprive the tenant of his undoubted right to remove the fixtures even during the continuance of the lease as for instance where during the term of the lease the lands are acquired by the Government under the Land Acquisition Act and possession is taken by the authorities in pursuance of the statutory notification. We would therefore suggest that the new section should run as follows: "The lessee may remove, at any time during the continuance of the lease, and until the lapse of a reasonable time even after the determination of the lease, all

1. (1910) I.L.R. 35 M 95: 21 M.L.J. 202 (F.B.).
2. (1927) L.R 54 I.A. 218 : I.L.R. 54 C. 669 : 53 M. L. J. 158 (P.C.).

things which he has attached to the earth provided he leaves the property in the state in which he received it."

The draft bill does not deal with another question which is equally important, viz., the right to compensation where the fixtures are not removed. On this point there has been a difference of view—see the judgment in *Angammal* v. *Aslamii Sahib.*[3] No doubt the recent decision of the Privy Council referred to above has decided that if the tenant does not remove the fixtures he will lose them. It is permissible to point that there is no legal basis for this view. There is no reason why the ownership of the tenant should be forfeited by his non-removal. The usage in this part of India has always been to recognise the right to compensation. Advantage should be taken of the present occasion to enact a clause in favour of the tenant's right to get compensation in proper cases.

The other proposed alteration in clause (*o*) of S. 108 is unexceptionable and may be accepted.

Clause (56) of the Bill proposes to amend S. 111, cl. (9) relating to determination of a lease by forfeiture. There is no reason why the words "or the lease shall become void" should be omitted. This is merely another way of stating that the lessor may re-enter on breach of an express condition. The decision in *Nil Madhab Sikdar* v. *Narattam Sikdhar*[4] related to a lease where the only provision was that a transfer by the lessee was void and not that the lease was to be void on a transfer by the lessee. The proposed sub-clause (1) of cl. (56) is unnecessary. If the said words are allowed to remain as they are, it is difficult to see why a condition in a lease which determines the same on the insolvency of the lessee (which condition is admittedly valid and operative by virtue of the proviso to S. 12 of the main Act) is not sufficient to have the effect of a forfeiture under S. 111, clause (*g*) even as it now stands. It does not seem to be correct to assume that a forfeiture of a lease requires an express clause of re-entry and that more general words determining the lease or words to the effect that the lease shall become void are insufficient for the purpose. We would therefore omit the proposed sub-clauses (2) and (3) of the new clause (56) as wholly unnecessary.

The sub-clause (*d*) which provides that there must be an act of the lessor evidencing his intention to determine the lease other than the institution of the legal proceedings to enforce

3. (1913) I. L. R. 38 M. 710 : 25 M. L. J. 625.

4. (1890) I.L.R. 17 C. 826.

forfeiture may be accepted as a desirable amendment. This will settle the conflict of views on the point.

Clause (57) of the Bill provides for a new section providing for relief against forfeiture of a lease in certain cases in addition to the existing provision of S. 114 which applies only to cases of forfeiture for non-payment of rent. We agree that the courts should have the power to give relief against forfeiture in cases of other breaches of covenant as well. The proposed section 114-A is however incomplete. Nor is there any necessity to make an exception in the cases mentioned in the proviso. We would prefer to give a discretion to the Court to relieve against forfeiture in all cases. We would suggest the following clause instead:—"Where a lease of immoveable property is otherwise determined by forfeiture and the lessor sues to eject the lessee the Court may, on application by the lessee, permit him to remedy the breach which occasioned the forfeiture within such time and on such terms as the Court may consider just; and if the lessee carries out the directions of the Court, the Court may in lieu of making a decree for ejectment pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

Clause (58) recasts the language of section 119 of the Act so as to make it clear that the benefit of the section can be availed of by the transferees from the original parties to the exchange. This is a reasonable amendment which should be accepted.

Clause (59) provides for the addition of the words "and liabilities of" in section 128 so as to make a universal donee liable not only for the debts of the donor but also for other kinds of liabilities due by him. This again is unobjectionable.

Clause (60) may also be accepted as there is nothing contrary to the rules of Hindu Law in Chapter VI of the Act.

Clause (61) proposes to omit the words introduced in S. 130 by Act XXXVIII of 1925, and insert the words "whether with or without consideration" after the words "The transfer of an actionable claim." We agree with the alterations proposed.

S. P. SASTRI.

THE TRANSFER OF PROPERTY ACT AMENDMENT (SUPPLEMENTARY) BILL.

L. A. BILL No. 34 OF 1927.

Clause (2) of the Bill amends S. 8 of The Married Woman's Property Act, 1874 by adding a new clause in the proviso to the effect that property settled on a married woman subject to restraint on anticipation cannot be proceeded against in execution by a creditor. This is to settle the conflict between the High Courts as to whether S. 8 of the Act prevails over the provisions of S. 10 of the Transfer of Property Act. We agree with the amendment which prefers the Madras and Bomaby view to that of Calcutta.

Clause (3) of the Bill introduces a new section in the Specific Relief Act to further carry out the statutory provisions now sought to be inserted in the Transfer of Property Act with regard to the doctrine of 'Part Performance.' We have already commented on the same with reference to the clause in the other Bill. In addition to the points referred to therein it should be borne in mind that the section as drafted here with reference to contracts to lease seems to apply only to written documents signed by the parties. In commenting on the changes proposed to be introduced in section 107 of the Transfer of Property Act it has been pointed out that it is not necessary to interfere with the settled view of the Madras Court that leases can be created by a document signed by the lessee only and accepted by the lessor. This aspect of the matter will have to be remembered in connection with the proposed section. If it is decided to give statutory effect to the doctrine of part-performance on the lines suggested by the Bill, the better way of doing it in the case under discussion is to omit the proposed section altogether and alter the definition of the word 'lease' in the Registration Act so as to make "an agreement to lease" free from compulsory registration. This will make the case of agreements to lease analogous to the cases of agreement to sell and the new clause (2) of the present Bill will be unnecessary.

Clauses (4) to (8) of the Bill seek to amend the provisions of O. 34 of the Civil Procedure Code in several particulars so as to make them clearer. We agree that, generally the amendments that are sought to be introduced are a distinct improvement and should be accepted. The language is made more precise and several lacuna are filled up. The provisions as to

the account that has to be taken are set out in great detail and may be accepted. We would however suggest the following for further consideration:

(1) In sub-clause (2) of Rule 2 as now proposed, it should be made clear that extension of time can be granted even after an application is made by the plaintiff under sub-rule (2) of sub-clause (1) for a final decree debarring the defendant from all right to redeem. It may also be expressly provided in the rule that the application can be made even after the expiry of the original period although the decisions take the same view even on the present language.

(2) The clauses providing for extension of time by the Court are now transferred to Rule 2 and Rule 7 of O. 34. This has been overlooked by the draft bill in not providing for consequential changes in O. 43, R. 1 (*o*) of the Civil Procedure Code which provides for an appeal against an order refusing to extend the time for the payment of the mortgage money. Sub-clause (*o*) of O. 43, R. 1 should be altered accordingly as follows: "An order under sub-clause (2) of Rule 2 and sub-clause (2) of Rule 7 of O. 34 refusing to extend the time for payment." The words "of the mortgage-money" in the old clause (*o*) should be omitted as the new amendments now provide for payment of other expenses and costs also.

(3) There is now a divergence of views on the question as to the effect of a partial payment or adjustment made outside Court. The question has arisen whether the final decree should ignore such matters and whether it is competent to the Court to take into consideration any payments made after the preliminary decree outside Court. The specific introduction of the word 'preliminary' in the rules in speaking of the preliminary decrees directing accounts, etc., will clearly operate to exclude the applicability of O. 21, R. 2 to such cases as the payment is not in execution proceedings. It is therefore desirable to consider the question whether the words 'into Court' should be retained in the various rules. One advantage in retaining them will be to ensure that there is no dispute as to alleged payments. On the other hand the extra cost and the obligation to give security in the case of minor decree-holders may operate as a hardship. Even in the case of suits by a father or managing member of the Hindu joint family where the minor members are parties *ex facie* some Courts have taken the view that security must be furnished before the amounts are drawn. It is a question of

policy as to which view should prevail. We do not see why mortgage decrees should involve additional liability than simple money decrees. We would therefore suggest that suitable amendments must be made to empower Courts to investigate such cases of alleged payments made outside Court and to give relief.

(4) The words "or at any time before the confirmation of a sale made in pursuance of a final decree" in the proposed new Rules 5 and 7 are ambiguous as it may be construed to narrow down the right of redemption only up to the confirmation of the first sale though only of some of the hypothecated items which may realise only a portion of the decree amount. For the sake of convenience and other reasons, it may be the case that sales of the mortgaged property take place at different times. The right of the mortgagor to make the payment of the balance due after partial satisfaction by sale of some items alone, and to get an order of redemption should be made clear. Under the Full Bench ruling of the Madras High Court in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*[1] the provisions of O. 21, Rr. 89 and 90 will apply to sales in execution of mortgage decrees also. The only additional privilege now sought to be conferred is to get a final decree for reconveyance, etc.

(5) The new Rr. 6 and 8-A substitute the words "if the balance is otherwise legally recoverable from the defendant personally" for the words "if the balance is otherwise legally recoverable from the defendant otherwise than out of the property sold." No reasons are given for the proposed change. It is not in all cases that the defendant is liable personally. In the case of minor members of Hindu joint families and such adult members as do not join in the mortgage deed executed by a managing member the other defendants will be liable for the deficiency of the sale proceeds out of other joint family properties. The same is the case with respect to the sons of a Hindu father where the mortgage is not for illegal or immoral purposes. In the case where the original executant is dead and the defendants are his legal representatives the balance is recoverable from the estate only. Substitution of the word 'personally' is therefore one which should be rejected.

(6) In Rules 7 and 8 it should be made clear that even in a suit for redemption it is open to the plaintiff-mortgagor

1. (1902) I.L.R. 25 M. 244: 12 M.L.J. 279 (F.B.).

also to apply for sale if he is unable to pay the amount into Court. The right to apply for sale is in terms given only to the defendant. The decision in *Govinda Taragan* v. *Veeran*[2] discusses the law on the point. The amendments now proposed in the corresponding rules may make it difficult to establish the mortgagor's right to apply for sale. It is therefore necessary to expressly provide, as S. 85 of the Conveyancing Act, 1881, does in England, that even a mortgagor can in an action for redemption ask for sale. Rules 7 and 8 should be altered suitably for that purpose.

(7) As regards the new Rule 11 dealing with the question of interest, instead of the words "the Court may order interest" the words "interest shall be payable" should be substituted as it may otherwise be contended that the Court has a discretion in the matter and is not bound to allow interest. The words "save as otherwise provided by any law for the time being" may be inserted in the beginning of the section so as to make it clear that this section is subject to the provisions of the Usurious Loans Act and S. 74 of the Contract Act.

(8) Rule 13 of O. 34, Civil Procedure Code, is left unamended. We would suggest that the words 'such proceeds' in the rule be deleted and the words "the proceeds of a sale directed under this order" be substituted. Again the order of appropriation laid down in the rule sometimes works a hardship as, for instance, in the decision in *Sabapathi Pillai* v. *Chockalinga Pillai*.[3] The words "and of the costs of the suit in which the decree directing the sale was made" should be omitted from the clause "thirdly, etc." They should be added as a fifth clause.

Clause (9) deals with the amendments to the Indian Registration Act, 1908.

Clause (*a*) of the new rule will be unnecessary if S. 107 of the Transfer of Property Act is not amended as suggested by us in dealing with that question.

Sub-clause (*b*) proposes to add a new clause enlarging the list of compulsorily registrable documents. We are not satisfied that assignments of decrees of Courts should be compulsorily registered where immoveable properties are dealt with.

2. (1911) I.L.R. 36 M. 32: 21 M.L.J. 941.
3. (1913) 25 M.L.J. 552.

The alteration suggested in sub-section (2), sub-clause (*vi*) may be accepted.

The proposed amendments relating to S. 48 of the Indian Registration Act are unobjectionable and may be accepted.

The proviso sought to be added in S. 49 of the Registration Act is again necessary if the doctrine of part-performance is to be statutorily recognised as provided in the Bill. In view of S. 4 of the Transfer of Property Act which makes the registration sections supplemental to the Registration Act the words "or the Transfer of Property Act, 1882" in the proviso as drafted may be omitted.

Clause (10) of the Bill deals with the amendments proposed to the Indian Succession Act, 1925, so as to bring it into conformity with the provisions of the Transfer of Property Act, Ss. 15 and 18. We have commented on the same in connection with the corresponding clauses in the main bill and the same remarks will apply even here. Incidentally this will also remove the somewhat anomalous position created by the previous legislation which while removing the incapacity of an unborn Hindu child being a donee or legatee did not make consequential amendments in the corresponding provisions of the Succession Act.

Clause (62) of the main bill and clause (11) of this supplementary bill deal with the question of retrospective effect of the new amendments. These clauses should be carefully considered, as the amendments proposed are of different kinds. Some are merely declaratory, some propose new changes in the substantive law, some have obviously retrospective effect being merely an authoritative settling of conflict of views and some are statutory provisions intended to embody existing law. We do not go into the matter at this stage as the various clauses of the bill may have to undergo further alterations in the light of public opinion and discussion in the legislatures.

S. P. SASTRI.

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put me to loss"; not merely "so as to put me to loss." And as a sapinda it is his duty to consider the lady's motive.

(3) "For the selfish gain of all of you." It does not lie in the defendants' mouths to complain that this should be more specific. They had carefully concealed from the plaintiff the arrangement to which they had come, and it was only, thanks to his Dewan (who died before the trial, page 760) that he knew as much as he did. Now that the arrangement has come to light the objection is fully justified.

(4) "You have intrigued with my long-standing enemy and arranged to adopt his son."

This may not be a fatal objection in law; but it cannot be said on the other hand that it was a consideration to which the plaintiff was bound to shut his eyes. Assuming as the plaintiff naturally assumed, and the 1st defendant had certainly accepted till January 1914, that he was the rightful son of the late Maharaja, it was very undesirable to have as owner of the important offshoot of the Zamindary, Gollaprole estate, a man who denied the legitimacy of the chief branch. It meant, to put it no higher, very great unpleasantness in the family.

Nor did the plaintiff make this a ground for vetoing an adoption altogether; he had been open to having a friendly discussion (para. 3) and probably even then would have been ready to discuss the matter with 1st defendant. It is argued that his prejudice was such that under no circumstances would he ever have consented. This is the region of hypothesis; but suppose the 1st and 2nd defendants had come to him and assured him that they fully recognized his birthright, and at the same time had allayed his reasonable suspicion of corruption, it is quite likely that he would have consented. Para. 4 correctly though roughly states the circumstances which led up to the adoption, and complains that the letter for permission was sent merely as a formality and not with an honest desire to obtain the plaintiff's consent.

That is true; but is not in my opinion a valid point of law. So long as defendant had asked plaintiff's consent we are not concerned with her *animus* in doing so.

That the adoption was barred by previous contract with the widow's husband may not have been a good legal point; but his thinking that it was certainly does not vitiate the whole of the plaintiff's refusal.

I consider this letter to be a valid refusal of consent on valid ground.

I do not consider it necessary to plaintiff's case to invalidate the consent given by the other sapinda, the 2nd defendant's father.

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But I find that he colluded with the 1st defendant and her brother D.W. 27 in order to alienate half the estate in plaintiff's despite. No doubt he himself neither gained anything nor lost much. Had there been no adoption a moiety of the reversion would have fallen to his share; by the adoption a moiety went to one of his sons; but, and this I consider to have been the motive underlying his consent, after the adoption nothing went to the plaintiff.

I infer collusion from the fact that he never informed Krishnaswami Chetty or indeed any one else of the proposed alienation.

No doubt if the consent of a substantial majority of the agnates nearest in relationship had been obtained, this Court need not trouble about the motives underlying the adoption. But such consent has not been obtained, and the refusal of consent is on valid ground. In such circumstances the adoption must be held to be void.

Considering that adoption is only a method by which a married couple can have a child, it may seem incongruous that a Court of law should concern itself with the underlying motive, and question whether it was caprice or corruption. That incongruity however disappears when the other aspect of adoption is considered, namely a method by which the holder of a life-interest can interrupt the normal succession, and confer an absolute estate. Then the question of caprice or corruption becomes very relevant. So in the leading Madras case *The Collector of Madura* v. *Muthuramalinga Sethupathi*[6] the Judicial Committee assumes that the Court is seeking for relevant evidence of motive and observes that an inference of proper motive may be founded upon the consent of the sapindas. In Bombay, on the other hand, where what may be called the religious, as opposed to the secular, aspect has been given greater prominence, it has been ruled that the widow's motive is not a relevant consideration, *Ramchandra* v. *Mulgi Nanabhai*.[3] Obviously such a ruling could never have been laid down if *The Collector of Madura* v. *Muthuramalinga Sethupathi*[6] was an authority in Bombay, a point which was clearly apprehended by the learned Judges who start on the assumption that *The Collector of Madura* v. *Muthuramalinga Sethupathi*[6] can be distinguished as not referring to the presidency of Bombay: *cf.* p. 565. In Bombay the consent of sapindas is not necessary, and the motives of the widow are not relevant and in Madras this divergence from Bombay has by no means diminished in the course of time. It might be said that the sanction of sapindas referred to in *The Collector of Madura* v. *Muthuramalinga Sethupathi*[6] is merely evidentiary, and if for some reason that evidence failed (as in our case where the sapindas are equally divided) presumably the Court would have sought else-

3. (1898) I.L.R. 22 Bom. 558 (F.B.).
6. (1868) 12 M.I.A. 397.

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where for material on which to ground an inference regarding the widow's motive. But by 1876 in *Sri Raghunadha* v. *Sri Brozo Kishoro*[13] we find

"It is admitted on all hands that an authorization by some kinsman of the husband is required . . . It may be the duty of a Court of Justice administering the Hindu Law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect of an adoption upon the devolution of property as a mere legal consequence" (what I have named the religious as opposed to the secular aspect). But it is impossible not to see that there are grave social objections to making the succession of property . . . dependent on the caprice of a woman . . . It seems therefore to be the duty of the Courts to keep the power strictly within the limits which law has assigned to it (the secular aspect).

Then in *Veera Basavaraju* v. *Balasurya Prasada Rao*[5] it is observed at page 272 :

"Division does not affect (the widow's) personal dependence or give her an independent status to alter by her own authority the succession to the estate. (The father's) authorization is therefore essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place. They also have an interest in the protection of the inheritance."

In fact the sapindas' sanction which at first seemed no more than evidentiary is now regarded as requisite. Sapindas do not merely affirm the conduct of the widow; they pronounce a decision in their own right as persons having an interest in the protection of the inheritance. And in this view of the law if no such decision has been pronounced owing to an equal division between the sapindas, there can be no adoption and there is no need for the Court to go further and inquire itself into the widow's motive. While if the only view of the law was that to be obtained from *The Collector of Madura* v. *Muthuramalinga Sethupathi*,[6] presumably the Court itself in the absence of evidentiary sanction would consider the widow's motive. But by no view of law in Madras can it be said that the widow's motive is entirely irrelevant, either as guiding the sapindas or, in their absence, as guiding the Court.

I may observe that in my opinion the sapinda does not function as the protector of the adoptee but as the protector of the inheritance, taking a longer view than one confined to the personal advantage of a single individual. So I see nothing paradoxical in the plaintiff's objecting to the bargain while he equally objected to the boy who had been chosen. No doubt the bargain injured the immediate adoptee, but it also injured the inheritance for all time: *cf.* judgment of Venkatasubba Rao, J., page 32.

This insistence upon the secular aspect has led to a suggestion that this Court should hesitate to pronounce as void an adoption

5. (1918) L.R. 45 I.A. 265: I.L.R. 41 Mad. 998: 36 M.L.J. 40 (P.C.).
6 (1868) 12 M.I.A. 397.
13. (1876) L.R. 3 I.A. 154 at 192: I.L.R. 1 Mad. 69 (P.C.).

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which according to their religion is essential for the future happiness of the adoptive parents; and from this point of view presumably plaintiff was asked in cross-examination whether he did not believe in the efficacy of Hindu ceremonies. But of course that is a region into which the Courts of law do not intrude. We decide that the adoption is one which cannot be upheld by the law of British India, and is ineffective wherever our writ may run. But a pious Hindu may hold, nevertheless, that according to the precepts of his religion the adoption is valid. He may hold that the proper person was selected and the proper ceremony performed, and regard "the effect of (such) an adoption upon the devolution of property as a mere legal consequence." We on the other hand "must keep the power strictly within the limits which the law has assigned to it," that is to say, the law as embodied by the reports of the Judicial Committee which govern our decision. But these reports are not the authority which will guide a pious Hindu or his religious advisers; for no one pretends that they have attained the character of sacred books. It is quite conceivable that a man whom the judgment of this Court has deprived of all status as an adopted son may nevertheless consider himself such, and may be so considered by his co-religionists. Exactly the same situation may be seen in Europe where a woman who in the eyes of the State and the secular law is duly married, is in the eyes of her church and her co-religionists not married at all.

If we held otherwise, and in our opinion those people who faithfully believe that the avoidance of an adoption consigns the adopting parents to perdition, must also believe that our act of avoidance has this dire effect, we might feel constrained to take some such course as that adumbrated in *Bhasba Rabidat Singh* v. *Indar Kunwar*[2] and merely avoid the condition while affirming the adoption. But I see no reason for taking a course which, in my opinion, would not follow the law of the Madras decisions. If a sapinda has for good reason refused his consent, it is not for the Courts to go behind his action, by introducing principles of equity which in other circumstances may prevail in England. And, of course, supposing an adoptee to be a man of his word, the result of our decision would be to reaffirm terms which the sapindas had justifiably found to be corrupt; and the sapindas' function as protectors of the inheritance would be gone. The adoptive mother as a device for turning her life-estate into an absolute estate makes a corrupt bargain with a future adoptee. The sapindas decline their assent holding the motive for the adoption to be corrupt. This Court nevertheless affirms the adoption, with the forlorn hope that if it avoid the terms the adoptee may be trusted not to renew the contract by virtue of which alone he gained his position as adopted son.

2. (1889) L.R. 16 I.A. 53. I.L.R. 16 C. 556 at 564 (P.C.).

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The recent decision of the Judicial Committee in *Krishnamoorthi Aiyar* v. *Krishnamoorthi Aiyar* [1] does not in my opinion help the defendants. Besides discussing the validity of a pre-adoption contract by the natural father, a point not now in question, this case is authority for the proposition which surely cannot be described as novel that all bargains between the adopting widow and the adoptee are not necessarily corrupt. Having regard to the particular circumstances of each bargain which may be called in question our Courts will have to decide whether the bargain was or was not so corrupt or capricious as to justify the sapindas in refusing or according their consent. Presumably a wide latitude will be allowed to the judicial discretion of a sapinda in such cases, but nice questions on the border line between pure and corrupt motive may possibly arise in future. No such question, however, arises in this case because the Judicial Committee has indicated one form of contract which is not permissible (and which therefore would justify a sapinda's refusal of consent), *i.e.*, terms which give the widow property absolutely, or give the property to strangers . . . Such arrangements are against the radical view of the Hindu Law, p. 528.

As regards the point taken in the opening paragraphs of the judgment of Krishnan, J., (page 3), whether certain evidence is admissible, I agree with the finding of the learned Judge for the reasons therein set forth. Mr. Grant conceded in the light of that decision that he would not further press the question of the plaintiff's birth, at least in this Court, though reserving his right to raise the whole matter, if necessary, on appeal should the Appellate Court take a different view upon the point of law. Therefore on the question of his birth I find for the plaintiff.

For the above reasons I would dismiss this appeal.

N.S. *Letters Patent Appeal dismissed.*

[End of Volume LV.]

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1 (1927) L.R. 54 I.A. 248: I.L.R. 50 Mad. 508: 53 M.L.J. 57 (P.C.).

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NOTES OF INDIAN CASES.

A. B. MITCHELL, *Re v.* J. C. DUTT, (1927) I.L.R. 55 Cal. 173.

A somewhat similar case came up before the Court of Common Pleas in England in 1876 where the Town Clerk of a borough mistakenly notified that the nomination papers for a Municipal election could be given till a certain date while the time prescribed by the Act expired on the previous day and the Court held that under the circumstances the election of a candidate who gave his nomination papers on later day was void. The only difference between the case under notice and the case in the Common Pleas Division is that in the present case the Chief Executive Officer of the Corporation of Calcutta notified that the deposit consequent on the submission of the nomination papers could be made on a day subsequent to the period prescribed by the Calcutta Municipal Act of 1923. The learned Judges in the present case have come to the same conclusion, *i.e.*, that the election of the candidate who paid the deposit amount on the later date was void. The decision in each case is no doubt one largely resting on the provisions of the particular statute.

The further question whether, in such a case, the candidate who secures the next highest number of votes can be declared to be duly elected has been disposed of by the learned Judges with the observation that there is nothing in the Act, so entitling the second candidate at the polls. It is, therefore, worthy of consideration what the law on the matter is in the absence of any specific provision in the enactment. As early as 1808,

it was laid down by Lord Ellenborough, C. J., in *The King* v. *Hawkins*,[1] that when a disqualified candidate secures the largest number of votes in an election the votes of those voters only who had notice of the disqualification and still voted for him should be deemed to have thrown away their votes and not have partaken in the election. So that if by rejecting those votes alone, the qualified candidate who gets the next largest number of votes gets to the top of the polls he may be declared duly elected. A similar view was expressed by Abbott, C. J., in *Claridge* v. *Evelyn*.[2] Where, however, the disqualification is not known to the electors and the disqualified candidate secures the largest number of votes, it has been held that the proper course is merely to set aside the election and order a fresh election. *Hobbs* v. *Morey*.[3] There was a doubt at one time whether for rejecting the votes it was necessary that the electors need only have knowledge of the facts that create the disqualification or should also know that they amounted to a disqualification. *The Queen* v. *Mayor of Tewkesbury*.[4] Since then, however, it has been held that a knowledge on the part of the electors of the disqualifying facts alone suffices for the purpose of throwing away the votes given. *Beresford Hope* v. *Lady Sandhurst*.[5] Even a doubt about the disqualification will not prevent the votes from being thrown away and the candidate next on the poll being declared elected. *Leominister's case*.[6] The effect of these decisions has been adopted in this country in *Gopala Aiyangar* v. *Ebrahim Rowther*[7] by a Full Bench of the Madras High Court. It may also be added that a disqualification need not necessarily be a personal disqualification but may be referrable to an invalid nomination. This is clear from *Howes* v. *Turner*[8].

BANKA BEHARI DEB *v.* BIRENDRA NATH DUTT, (1927) I.L.R. 55 Cal. 219.

The learned Judges having come to the conclusion that the order of remand by the lower appellate Court in the case was not one passed under Order 41, Rule 23 of the Civil Procedure Code, it is clear that there is no right of appeal

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1. (1808) 10 East 211: 103 E.R. 755. 2. (1821) 5 B. & Ald 81 · 106 E.R. 1123.
3. (1904) 1 K.B. 74. 4. (1868) L.R. 3 Q.B. 629. 5. (1889) 23 Q.B.D. 79.
6. Rogers on Elections, 19th Edition, Vol. II, p. 619.
7. (1925) I.L.R. 48 M. 509: 49 M.L.J. 606 (F.B.).
8. (1876) 1 C.P.D. 670.

from the order. It may be that there is something to be said against the view that has been given expression to in some of the cases, that an order of remand should be presumed to have been passed under Order 41, Rule 23, though it does not purport to have been so passed and an appeal should be entertained therefrom on that footing. In such a case, the appellate court having the power to remand a case both under Order 41, Rule 23 of the Civil Procedure Code and under its inherent jurisdiction, there may be no more reason to relate the order to any one of such powers and it may be a question to be decided in each case, under which category the particular order falls before coming to a conclusion whether it is appealable or not.

Where, on the other hand, the appellate court purports to remand the case under Order 41, Rule 23 of the Civil Procedure Code, it is too much to expect the litigant to decide for himself whether the order is one rightly falling under that rule or not, in coming to a conclusion on its appealability. We venture to think that the observations of one of the learned Judges in the case under notice to that effect, must be taken to be *obiter* and there seems to be no warrant for the view that where a decision purports to be given under a section under which if it is rightly given, the decision would be appealable, there would be no appeal if the decision is not rightly given under the section. The question has arisen under various enactments and it has been generally answered that where an order purports to be given under a section, it is none the less appealable as an order properly passed under that section. The principle is supposed to have been laid down by the Privy Council in *Hurish Chunder Chowdhry* v. *Kalisunderi Debi*[1] where the learned Chief Justice of the Calcutta High Court held that there was no appeal from an order which he considered was purely ministerial though the order purported to be a judicial order passed by the Judge in the exercise of his judicial discretion. The Privy Council overruled this view and held that in such a case there would be a right of appeal treating it as a judicial order which it purported to be. This view of the Privy Council was followed by the Calcutta High Court in *In the Goods of Indra Chandra Singh*[2] where the learned Judges observed that if an order is made without jurisdiction, an appeal

1. (1883) I.L.R. 9 C. 482: 10 I.A. 4 at 27 (P.C.).
2. (1896) I.L.R. 23 C. 580 at 590.

would none the less lie from it. The same view was taken by another Bench of the same Court in *Moharaj Kumar Bindeswari* v. *Thakur Lakpat Nath Singh*,[3] after a reference to the prior decisions. The question has been considered by the Madras High Court in *Abdul Rahim Sahib* v. *Ganapathi Batta*,[4] *Latchmanan Chetty* v. *Ramanathan Chetty*[5] and *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[6] and the learned Judges have held that where an order is purported to be made under a particular section, it is appealable as such, even though it was not properly made under the section. *Prasanna* v. *Baidya Nath*[7] and *Gopal Singh* v. *Mangal Singh*[8] are some of the decisions where the question of the appealability of a remand order purported to be made under Order 41, Rule 23 of the Civil Procedure Code came up before the High Courts and was decided in the affirmative. There seems therefore to be no reason on principle or authority to doubt the correctness of these decisions and the learned Judge in the case under notice has not referred anything to the contrary.

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3. (1910) 15 C.W.N. 725.
4. (1900) I.L.R. 23 M. 517: 10 M.L.J. 305.
5. (1904) I.L.R. 28 M. 127: 14 M.L.J. 436.
6. (1921) I.L.R. 44 M. 919 : 41 M.L.J. 316.
7. (1920) 31 C.L.J. 360.
8. (1927) 107 I.C. 284.

MUTHIAH CHETTY *v.* PALANIAPPA CHETTY, I.L.R. 51 Mad. 349: 55 M.L.J. 122 (P.C.).

This is an appeal from the judgment of the High Court of Madras in *Muthiah Chetty* v. *Palaniappa Chetty*.[1] The learned Judges of the High Court held that though there is no attachment, if both the decree-holder and the claimant proceed upon the footing that there was one and an adverse order is passed against the claimant he is bound to come within the one year provided by Article 11 of the Limitation Act. Their Lordships came to that conclusion on some ground of estoppel. Their Lordships of the Privy Council dissent from this conclusion and hold that if there is no attachment in execution, there can be no claim and no order thereupon to which conclusiveness would be attached by Order 21, Rule 63 if a suit is not brought to set it aside within the one year provided by Article 11 of the Limitation Act. Their Lordships cannot be taken to hold that the party could not be estopped from contending that there was no attachment but only that the circumstances did not warrant the raising of such an estoppel. There cannot be an estoppel against the statute but on the question of fact, attachment or no attachment there might be estoppel or *res judicata* which is only a species of estoppel. In the case under review, there was no question of *res judicata*, and beyond an error as to facts on both sides, there was no foundation for an estoppel as to the fact of attachment.

Their Lordships make it clear that the order directing attachment is quite distinct from attachment itself and in the absence of attachment as directed by the Civil Procedure Code none of the consequences attaching to a valid attachment can follow—one of which is the application of Article 11 to orders on claim petitions.

SUBRAHMANYA AIYAR *v.* SABAPATHY AIYAR, I.L.R. 51 Mad. 361: 54 M.L.J. 726 (F.B.).

This decision sets at rest the conflict of rulings as regards the effect of a *bona fide* partition as between a father and his sons on the creditors' right of recourse against the share allotted to the son. If the dictum in *Sahuram Chandra* v. *Bhup Singh's*[2] case that there is no liability in the son to pay the debts of the father during the latter's lifetime except in so far as the

1. (1921) I.L.R. 45 Mad. 90: 41 M.L.J. 594.
2. (1917) I.L.R. 39 All. 437: 33 M.L.J. 14 (P.C.).

former could be reached through the power of the father to sell for his antecedent debts, it could with force be urged that during father's lifetime once there is partition, the sons could no longer be proceeded against. Seeing that that view has been abandoned, it seems difficult on principle to justify the conclusion that the sons are exempted from liability in respect of the properties in their possession after partition. All the Judges seem to be agreed that if the partition is so arranged that the father's share is insufficient to meet the debts, the partition would be regarded as *mala fide* and may be questioned by the creditor. It is difficult to see how this view is reconcilable with the position that the liability of the son is only in respect of the joint family property during the continuance of the joint status. What fraud is there in not providing for the payment of debts in respect of which he is no longer liable? The very reservation in respect of *mala fide* partitions would seem to involve necessarily the conclusion that in respect of the father's debts there is a liability in the sons to the extent of the joint family property in their hands and failing to provide for them is fraud.

Undoubtedly the nature of the liability of the son is peculiar. He cannot be sued apart from the father so long as the father is alive (*Periaswami Mudaliar* v. *Seetharama Chettiar*[1]) and his liability is only to the extent of the property in his hands. On the death of the father the sons divide the liability according to their shares. The detailed provisions as to when a person is liable for the debts of the father came to be enacted as pointed out by Mr. Justice Subramania Aiyar in *Ramasami Nadan* v. *Ulaganadha Goundan*[2] by reason of the absence of any process available against property directly and apart from the person of the debtor. Even after the death of the father, if the son is a minor, he is not to be liable. अप्राप्तव्यवहारश्चेत् स्वतन्त्रोऽपि नर्णभाक्. The same sort of provision is laid down as regards payment of debts incurred for family necessity. The conclusion need not be regretted for the principle of right by birth is reconcilable with justice only if a certain amount of latitude is allowed to the creditor of the father to proceed against the family property, seeing especially that the rule as to right by birth is applicable under the Hindu Law equally to self-acquired property of the father.

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1. (1903) I.L.R. 27 Mad 243: 14 M.L.J. 84.
2. (1898) I.L.R. 22 Mad. 49: 8 M.L.J. 312 (F.B.).

In the matter of BALUSAMI, I.L.R. 51 Mad. 417: 55 M.L.J. 175 (F.B.).

GOPALA KRISHNAYYA *v.* GOPALAN, I.L.R. 51 Mad. 342: 54 M. L. J. 674.

In the former case, the Full Bench held that on severance of status between the father and sons by a suit for partition, the power of the Official Assignee to sell the son's share for the father's debts is at an end. It is an intelligible proposition that the power once vested in the Official Assignee is not affected by any subsequent event just as it is not affected by the death of the father (*Balavenkata Seetharama Chettiar* v. *Official Receiver, Tanjore*[1]), but the distiction made by the Officiating Chief Justice between complete partition and incomplete partition does not seem to be justifiable in principle. The power of the father is derivable from the joint status and once that joint status is severed, any further power in the father seems to be indefensible on principle. On the whole, we think the conclusion arrived at by the majority is sound, *viz.*, that the Official Assignee would have the power of the father with all its inherent defects. In the second of the cases, the same principle has been applied to property attached by a creditor of the son. In *Subraya* v. *Nagappa*[2] the Bombay High Court took the view that once the son's share is attached, the father's power of disposal of the same is at an end. If the Official Assignee's power is of the same quality and subject to the same limitations as that of the father, then the same consequence should follow on attachment of the son's share though in the meanwhile the father's power is vested in the Official Assignee. There is no conflict between the ruling in these cases and *Subramania Aiyar* v. *Sabapathi Aiyar.*[3] Under the latter ruling, no doubt the liability of the son continues even after partition but it does not follow that the same methods are available to the creditor both before partition and after partition. The difference is very familiar to lawyers. A decree against the father, though executable against the sons during his life-time, was not before the present Code of Civil Procedure executable as against the sons and the creditor's only remedy was a suit on the basis of the decree (*Periasami Mudaliar* v. *Seetharama Chettiar*[4]). Partition had

1. (1926) I.L.R. 49 Mad. 849: 51 M.L.J. 269 (F.B.).
2. (1908) I.L.R. 33 Bom. 264.
3. (1927) I. L.R. 51 Mad. 361: 54 M.L.J. 726 (F.B.).
4. (1903) I.L.R. 27 Mad. 243: 14 M.L.J. 84.

a similar effect and there is, no doubt, that the remedy of a suit on the decree was equally available in such a case. Though the general principle laid down in the second case is sound, the application seems to be of doubtful correctness; attachment prohibits only private sales by the judgment-debtor and cannot affect the dominant rights of other persons or even of the judgment-debtor in performance of a prior or overriding duty.

SANKUNNI MANNADIAR *v.* KRISHNA MANNADIAR, I.L.R. 51 M. 320 : 54 M.L.J. 682.

In a previous suit, a curious decree was passed removing a karnavan and appointing "the 1st and 3rd plaintiffs to the management" as prayed for by the plaintiffs of whom the 2nd plaintiff was the next senior anandravan to the 1st plaintiff. In this case the Court had to appraise the effect of such appointment on the rights of the 2nd plaintiff when the 1st died. Their Lordships, we think rightly, held that the decree did not affect the rights of the 2nd plaintiff when he became entitled to karnavanship. Neither family karars nor decrees can be presumed to make provision for a scheme of management indefinitely. On the other hand, there is authority for holding that Courts have no power to frame schemes at all (though the case in *Nemamma Kudre* v. *Achmu Hengsu*[1] sounds a dissentient note) and that in the case of karars restrictions on karnavan's rights of management must be presumed to apply only to the karnavan in question and if any of his successors are intended to be bound the person intended to be bound must be a consenting party thereto and it must also clearly appear that it was intended to have that effect. *Prima facie* the only question that would be discussed in a suit for removal of a karnavan is whether he ought to be removed or not. Questions as to the fitness of the immediate successor might arise on the ruling in *Nemamma Kudre* v. *Achmu Hengsu*[1] but when the successor is not removed but allowed to continue, no further question could normally arise and the rights of management of the next in seniority whose rights are only a sort of *spes successionis* dependent on his survival cannot, in the absence of the clearest language, be held to be adjudicated upon.

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1. (1919) I.L.R. 43 Mad. 319: 37 M.L.J. 539.

JAYAPPA LOKAPPA *v.* SHIVANGOUDA DYAMANGOUDA, I.L.R. 52 Bom. 72.

In the view that the learned Judges have taken of the construction of the security bond in the case, *i.e.*, that the surety has not rendered himself or his properties liable for the default of the particular judgment-debtor, the further question whether a security bond given to the court charging or mortgaging the immoveable properties of the surety requires registration or not, did not arise for decision. But the learned Judges have discussed the question and come to the conclusion that a security bond charging immoveable properties given as a condition for obtaining an order for stay of execution by the appellate court does not require registration under the Registration Act. In coming to this conclusion they have differed from *Nagarum Sambayya* v. *Tangatur Subbayya*[1] where such a document was held to require registration. It must be said that the Judges who decided the latter case clearly kept in view the considerations and decisions of the Privy Council referred by the learned Judges in the present case, but came to the contrary conclusion. The two leading decisions of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu*[2] and *Prattal Anni* v. *Lakshmi Anni*[3] were referred to by the Madras Judges and held to have no bearing on the question. The later case in *Hemanta Kumari Debi* v. *Midnapur Zamindari Company*[4] does not really add anything to what has been decided by the Privy Council in the earlier cases. We, therefore, venture to think that there is no justification for the remark that the learned Judges in *Nagarum Sambayya* v. *Tangatur Subbayya*[1] had not the Privy Council decisions cited to them or did not consider them. One point made by the learned Chief Justice in the present case must, however, be noticed; his Lordship points out that such a document may not amount to a mortgage if it is given to the court, as a mortgage must be to a particular "person" and the court is not a legal person as shown by the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*.[5] None the less, there is the creation of a right in immoveable property and the question will still remain whether the security bond comes under any of the exempting clauses of S. 17 of the Indian Registration Act.

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1 (1908) I.L.R. 31 M. 330. 2. (1897) I.L.R. 20 All. 171 (P.C.).
3. (1899) 26 I.A. 101: I.L.R. 22 M. 508: 9 M.L.J. 147 (P.C.).
4. (1919) 46 I.A. 240: 37 M.L.J. 525 (P.C.).
5. (1919) I.L.R. 42 A. 158: 38 M.L.J. 302 (P.C.).

VENKATARAMA AIYAR *v.* OFFICIAL RECEIVER, TINNEVELLY, I.L.R. 51 Mad. 344 : 54 M.L.J. 585.

If after presentation of the petition in insolvency and before adjudication, the debtor should die, what is to happen—was the question that arose in this case. There would have been no difficulty on the section as it stood in Act III of 1907. "The proceedings shall be continued as if he were alive", was the language in the old Act and that is the language of the Presidency Towns Insolvency Act, and that is the language of the English Bankruptcy Act. The legislature would not let well alone but would improve the language and the present Act says instead: "shall be continued so far as may be necessary for the realisation and distribution of the property of the debtor". Naturally the question arises what about setting aside fraudulent alienations and distribution *pro rata*, etc., which is the consequence only of adjudication and cannot result without an adjudication for which, without straining, there is no provision in the new language. But strain, their Lordships did and we think rightly. The petition in this case was by the debtor and the ruling has since been applied to the creditor's petition by Ramesam and Devadoss, JJ.

BALLA MAL *v.* ATA ULLAH KHAN, L.R. 54 I.A. 372: I.L.R. 9 Lah. 203: 53 M.L.J. 166 (P.C.).

Deeds of *wakf* by Mahomedans which contain provisions for the settlor and his descendants and other members of his family have always been scrutinised by the Privy Council with some amount of suspicion as regards their *bona fide* character and unless there is a substantial and real dedication of the properties to charity, such wakfnamas have been held to be illegal, when it appears that the real object was to make a family settlement under the cloak of a *wakf*, even if it should appear that there is a gift to charity of a substantial amount. The wakfnama which was the subject-matter of dispute in the present decision was one of the usual type which their Lordships have declined to uphold on the principle stated above. No doubt if the wakfnama in question had been executed after the Act VI of 1913, it would have been valid but the Wakf Validating Act not being retrospective could not apply. It is interesting to note that attempts are being made to introduce private legislation to make the Wakf Validating Act retrospective.

RAJ MAL *v.* HARNAM SINGH, I.L.R. 9 Lah. 260.

The language of the enacting section being clear and unambiguous, its effect cannot be cut down by the terms of the preamble of the Act. It is only if there is ambiguity in the enacting part that it is permissible to have recourse to the preamble to explain and elucidate the meaning of the legislature. This decision reviews the cases on the point which deal with the question as to how far it is legitimate to refer to the preamble of an Act in construing the sections thereof. As observed by the Judicial Committee in *The Secretary of State for India* v. *Maharajah of Bobbili*,[1] where the section of the Act makes operative provisions in excess of the apparent ambit of the preamble "it is the section that must govern."

In the Matter of H. DALY AND OTHERS, I.L.R. 9 Lah. 269.

This is an interesting judgment as regards the power of the High Court to expunge passages from judgments delivered by itself or by Subordinate Courts. The jurisdiction may be exercised by virtue of its powers of superintendence under the Government of India Act, under section 151, Civil Procedure Code and section 561-A of the Criminal Procedure Code. Although in one case the Madras High Court doubted if it had jurisdiction to expunge remarks in a judgment against persons not parties to the proceedings, see *In re Krishnaswami Iyengar*,[2] there are a number of decisions of the High Courts which hold that the power exists and may be exercised in proper cases.

DELHI CLOTH AND GENERAL MILLS CO., LTD. *v.* INCOME-TAX COMMISSIONER, DELHI, L.R. 54 I.A. 421: I.L.R. 9 Lah. 284: 53 M.L.J. 819 (P.C.).

Section 66-A of the Income-tax Act of 1922 provides for a statutory right of appeal to the Privy Council against orders passed by the High Court on references made to it under S. 66. Prior to the enactment of this new section by the Income-tax Amendment Act of 1926, there was no appeal as of right to the Privy Council. See *Tata Iron and Steel Co.* v. *Chief Revenue Authority, Bombay*[3]. The Privy Council have held in the pre-

1. (1919) L.R. 46 I.A. 302: I.L.R. 43 Mad 529: 37 M.L.J. 724 (P.C.).
2. (1917) 35 M.L.J. 368.
3 (1923) L.R. 50 I.A. 112 : I.L.R. 47 B. 124 : 45 M.L.J. 295 (P.C.).

sent decision that the right of appeal granted by section 66, clause (2) is confined to cases described in sub-section (2), *i.e.*, only to cases which the High Court certifies to be a fit one for appeal to His Majesty in Council and that the reference to the provisions of sections 109 and 110, Civil Procedure Code in sub-section (3) does not enlarge the class of cases where an appeal will lie as of right, because of the limited referential words in the sub-section, *viz.*, "so far as may be". The words "fit one for appeal to His Majesty in Council" are taken from section 109, clause (*c*), Civil Procedure Code and should be construed in the same sense as in the Civil Procedure Code.

It is also worthy of note that in the particular case, their Lordships while reiterating the principle of the well-known decision of *Colonial Sugar Refining Co.* v. *Irving*[1] apply it to the converse case. " Provisions in a statute which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of an express enactment or necessary intendment." Hence orders which were final at the date of the new statute and not liable to be appealed against cannot be affected by the new right of appeal conferred by the statute for the first time.

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1. (1905) A.C. 369.

JAI NARAIN SINGH *v.* MUNNA LAL, I.L.R. 50 All. 489.

The learned Judges in this case dissent from the decision of the Madras High Court in *Appalasuri* v. *Kannamma Nayuralu*,[1] but if the reasoning in this case is right, *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati Alakajeswari*[2] ought to have been decided the other way about. In that case, the elder widow mortgaged the land for necessity but their Lordships say that it was not competent for her to do so. The widows may be co-parceners in the English sense of the term but to call them co-parceners in the Hindu law sense seems to be unjustifiable and it would seem equally so to apply to them the rule applicable to co-parceners in the Hindu law sense of the term. In *Kalyanasundaram Pillai* v. *Subba Mooppanar*[3] it was ruled relying upon *Jijoyiambi Bayi Saiba* v. *Kamakshi Bayi Saiba*[4] that the senior widow was entitled to the care and management of the property and as such entitled to bind the junior by alienating for necessity. The distinction suggested in *Appalasuri* v. *Kannamma Nayuralu*[1] that in *Kalyanasundaram Pillai* v. *Subba Mooppanar*[3] the senior widow was acting as manager with consent does not seem to be justified as just at the relevant time, there seems to have been an estrangement and the alienation is supported only by reference to *Jijoyiambi Bayi Saiba* v. *Kamakshi Bayi Saiba.*[4] No doubt in *Vadali Mamidigadu* v. *Kottapalli Ramayya*[5] the same learned Judges that decided *Kalyanasundaram Pillai* v. *Subba Mooppanar*[3] hold that unless one widow is managing for both she cannot bind the other even for necessity. It seems to be fairly agreed that if one of them is constituted a manager for the other or if the assent of the other is taken to the alienation, the alienation would be good. Could not such assent be given in advance in a partition deed between the two and further could not such assent be inferred when there is a partition? It is possible to hold on the analogy of the case of joint trustees that every individual act of alienation should have the intelligent assent of each of the widows, but granting there is necessity, and the person acting is also a widow, and management by one is in accordance with the genius of Hindu law, why should not such assent suffice? *Thakurmani Singh* v. *Dai Rani Koeri*,[6] which is relied upon in the case under review does not seem to

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1. (1925) 49 M.L.J. 479.
2. (1892) I.L.R. 16 M 1 · 19 I.A. 184 (P C).
3. (1902) 14 M.L.J. 139.
4. (1868) 3 M.H.C.R. 424
5. (1902) I.L.R. 26 M. 334.
6. (1906) I.L.R. 33 C. 1079.

touch the question. The case seems to proceed entirely on the peculiar circumstances of the case, *viz.*, that one widow had surrendered her share of the estate to the reversioners and having thus consented to a division of title the reversioners were estopped from denying the title of the other widow to deal with her share for necessity—an unsatisfactory ground the more so after the later pronouncements of their Lordships of the Privy Council against partial surrenders. There is much to be said from the point of view of convenience in favour of the view taken in this case.

SURENDRA KUMAR ROY CHOWDHURY *v.* SUSHIL KUMAR ROY CHOWDHURY, I.L.R. 55 Cal. 249.

The question that arose in this case, as to the jurisdiction of a court to appoint a receiver or order a temporary injunction pending arbitration proceedings, does not seem to have been considered by any of the High Courts in India in any of the reported cases, though there are two decisions in the Judicial Commissioner's Court of Sind in *E. D. Sassoon & Co.* v. *Mangalchand*[1] and *Chetansing Bagasing* v. *Gulibai*[2] bearing on the question. The latter deals with the same point as the one in the case under notice and it was held that a court has power to appoint a receiver though the subject-matter of the suit has been referred to arbitration pending suit and the arbitration proceedings are pending, a conclusion which is the same as that reached by the learned Judges in this case. As pointed out by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*[3] in such a case all proceedings from the first to last are under the supervision of the court and it may therefore be suggested that the court retains jurisdiction to appoint a receiver pending arbitration. The real objection that has been raised to the power of the court to appoint a receiver pending a reference through court has been rested on sub-clause (2) of clause (3) of the second schedule to the Civil Procedure Code by which if a matter is referred to arbitration, the court is not to deal with the matter in the suit. We take it that the answer to the objection is that in the first place that the right to ancillary reliefs pending suit do not form the subject-matter of the suit and are not ordinarily the subject of reference. Another answer seems to

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1. (1909) 4 I.C. 609. 2. (1923) 78 I.C. 84.
3 (1901) I.L.R. 29 C. 167 at 182. 29 I.A. 51 at 57: 12 M.L.J. 77 (P.C).

be by way of analogy to the 18th rule of the second schedule to the Civil Procedure Code and section 19 of the Arbitration Act. In cases falling under the corresponding provision of the English Arbitration Act, it has been held in England that though an action is stayed by reason of an agreement by parties to refer the matter to arbitration outside court prior to action, the court can none the less order a temporary injunction or appoint a receiver of the properties pending the arbitration proceedings, at the time of granting the stay or even afterwards. *Zalinoff* v. *Hammond.*[4] The prior cases have been reviewed by Mr. Justice Kay in *Compagnie de Senegal* v. *Woods.*[5] *See* also *Cumberland Union Banking Company* v. *Maryport Hematite Iron and Steel Company.*[6] If, therefore, a stay of suit under rule 18 of the second schedule to the Civil Procedure Code and section 19 of the Arbitration Act does not affect the jurisdiction of the court to order an injunction or to appoint a receiver, there seems to be no reason why a reference through court under rule 1 should have a greater effect and prevent the court from granting the ancillary reliefs. There can thus be objection to giving the provisions of rule 3 the same operation as to a stay of suit under rule 18 of the same schedule.

BASAPPA BUDAPPA *v.* BHIMANGOWDA SHIDDANGOWDA, I.L.R. 52 Bom. 208.

It is somewhat difficult to follow the decision of the learned Judges in this case. Pending a suit for partition one of the parties to the suit alienated one of the properties which formed the subject-matter of the suit to a stranger. Another party to whom a moiety of the property fell under the partition decree in the suit brought a separate suit to recover from the alienee the moiety in the property alienated. In the first place, the learned Judges held that the purchase was *lis pendens* and the purchaser was bound by the decree. But on the question whether the suit was barred by the provisions of section 47 of the Civil Procedure Code, the learned Judges held that it was not and that the suit was maintainable. It is clear that the term "representative" in section 47 is not restricted in its significance to a legal representative, such as an heir, executor or administrator; and the question has arisen who are the other classes of persons who come under the term "representatives" and it has been answered in *Ajodhya*

4. (1898) 2 Ch. 92. 5. (1883) 53 L.J. Ch. 166.
6. (1892) 1 Ch. 633.

Roy v. *Hardwar Roy*[1] by Sir Asutosh Mookerjee and Carnduff, JJ., as including any transferee of the interest of the decree-holder or judgment-debtor who so far as such interest is concerned is bound by the decree. Two tests have been propounded by those learned Judges for determining whether a particular person is a representative of a party to the suit, namely, (1) that some portion of the interest of the decree-holder or judgment-debtor which was originally vested in one of the parties to the suit, should have by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and (2) if there has been a devolution of interest, so far as such interest is concerned, that person should be bound by the decree. Applying these tests, there can be no doubt that the purchaser under the private sale *pendente lite* is a representative of the judgment-debtor. If the purchaser claimed under an execution sale pending suit, it may be that the Bombay High Court would have held following a course of decisions in that Court, that he is not a representative of the judgment-debtor (see *Narsinhbhat* v. *Bando Krishna*[2]) differing in that respect from the view held in Calcutta and Allahabad. See *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*[3] and *Gulsari Lal* v. *Madho Ram*.[4] There being no such conflict of views in the case of a private sale, we fail to see why the question is not one relating to the execution of the decree in the partition suit between a party to the suit and the representative of his opposite party and consequently a separate suit is not barred under section 47. We venture to submit that nothing that was said in *Bimal Jati* v. *Biranja Kuar*[5] takes away from the force of the observations in *Madho Das* v. *Ramji Patak*.[6]

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1. (1909) 9 C.L.J. 485.
2. (1918) I.L.R. 42 B. 411.
3. (1896) I.L.R. 24 C. 62 (F.B.)
4. (1904) I.L.R. 26 A. 447.
5. (1900) I.L.R. 22 A. 243.
6. (1894) I.L.R. 16 A. 286

NIRMALA SUNDARI DASSI *v.* DEVA NARAYAN DAS CHOUDHURI, I.L.R. 55 Cal. 269.

In this case a Hindu mother succeeding to her son purchased immoveable properties out of the incomes derived from the son's estate in the benami of another person and the accounts of incomes of these properties were mixed with those of the properties enjoyed by her as heiress of her son and the question was as to the nature of her right over the properties purchased by her and the course of succession to the same. There being no text of Hindu law on the point (see *Akkanna* v. *Venkayya*[1]) and it being accepted that a Hindu woman holding a qualified estate has absolute properties in the incomes derived therefrom, it seems clear on principle that she holds these incomes and the properties purchased therefrom in absolute right unless it is shown that she has incorporated them with the properties in which she has only a qualified right. In this respect the position may be likened to the case of an owner of a joint ancestral impartible estate deriving incomes from the estate and making purchases out of the same. In this connection reference may be made to *Parbati Kumari Debi v. Jagadis Chunder Dhabal*[2] and *Rani Jagadamba Kumari* v. *Wazir Narain Singh.*[3] In the first of these cases, both the accounts of the impartible estate and of the purchased properties were mingled together and still it was held by the Privy Council that the properties purchased with the incomes were not incorporated with the impartible estate and did not devolve by the rule relating to such an estate. The cases of a member of a joint family throwing his self-earnings or separate property in the common stock may also have an analogy to the present case. While the matter seems thus to be clear on principle, some dicta of the Privy Council in *Isri Dutt Koer* v. *Hansbutti Koerain*[4] have, we venture to think, obscured the issue. The decision of the Privy Council in *Saodamini Dasi* v. *The Administrator-General of Bengal*[5] was believed to have cleared up the confusion to some extent. The later decision of the Privy Council in *Nabakishore Mandal* v. *Upendrakishore Mandal,*[6] where it does not appear that the previous decision of the Privy Council in *Saodamini Dasi* v. *The Administrator-General of*

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1. (1901) I.L.R. 25 M. 351 at 357: 12 M.L.J. 5.
2. (1902) I.L.R. 29 C. 433: 29 I.A. 82 (P.C).
3. (1922) I.L.R. 2 Pat. 319: 50 I.A. 1: 44 M.L.J. 503 (P.C).
4. (1883) 10 I.A. 150: I.L.R. 10 C. 324 (P.C).
5. (1892) 20 I.A. 12: I.L.R. 20 C. 433 (P.C).
6. (1921) 42 M.L.J. 253 (P.C).

Bengal[5] and the Indian decisions in *Akkanna* v. *Venkayya*,[1] *Subramanian Chetti* v. *Arunachalam Chetti*[7] which considered it, were referred to, there are some observations which go against the accepted notions on the question and lay down that it is upon those who assert that the acquired properties are her absolute properties to show that she treated them as her own, by her dealings with the same. When these observations were relied upon before the Madras High Court in *Ayiswaryanandaji Saheb* v. *Sivaji Rajah Saheb*,[8] the learned Judges declined to treat them as well-considered such as to justify their going back on the previous decisions. The nature of the estate held by a qualified owner in the properties or securities purchased out of the incomes has been examined fully in the judgment of Sir S. Subramania Aiyar in *Subramanian Chetti* v. *Arunachalam Chetti*[7] and it is impossible to add to what the learned Judge has said. The later observations of the Privy Council in *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar*[9] and *Nabakishore Mandal* v. *Upendrakishore Mandal*[6] have been fully considered by Sir C. V. Kumaraswami Sastriar in *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao*[10] and *Ayiswaryanandaji Saheb* v. *Sivaji Rajah Saheb*.[8] The view taken by the learned Judges in the case under notice does not materially differ from what has been said by the learned Judge in the above cases, though the learned Judges have not noticed the observations of the Privy Council in *Nabakishore Mandal* v. *Upendrakishore Mandal*.[6] As to treating the accounts of both the original estate and the acquired properties together, that circumstance is not entitled to much weight, as pointed out in *Akkanna* v. *Venkayya*[1] and *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*.[2]

BHAGWATI *v.* BANARSI DAS, I.L.R. 50 All. 371: 54 M.L.J 689 (P.C.).

Section 55, clause (1) of the Transfer of Property Act provides that, in the absence of a contract to the contrary, the seller is bound to discharge all incumbrances existing on the

1 (1901) I.L.R. 25 M. 351 at 360: 12 M.L.J. 5.
2. (1902) I.L.R. 29 C. 433 at 435: 29 I.A. 82 (P.C.).
5. (1892) 20 I.A. 12: I.L.R. 20 C. 433 (P.C.).
6. (1921) 42 M.L.J. 253 (P.C). 7. (1904) I.L.R. 28 M. 1.
8. (1925) I.L.R. 49 M. 116 at 151: 49 M.L.J. 568.
9. (1918) I.L.R. 42 M. 581: 46 I.A. 64: 36 M.L.J. 164 (P.C).
10. (1922) I.L.R. 46 M. 190: 43 M.L.J. 486 (F.B.).

property. In this case the sale-deed provided that if any incumbrance in respect of the whole or part of the property was discovered or part of the property sold and as a result of the claim the property pass out of the possession of the vendees the vendors should pay to the vendees the consideration of the sale-deed to the extent the property sold passes out of their possession. The High Court was of opinion that here there was a contract to the contrary within the meaning of the section and that the vendors were confined to the particular relief provided in the sale-deed and could not claim the money they had to pay the incumbrancer to prevent sale of the property in execution of a decree on such undisclosed mortgage. Their Lordships held otherwise. Their Lordships' view was that the provision made in the event of the vendees being put out of possession was an additional safeguard and not the sole remedy. Their Lordships were clear that "it did not contradict or restrict the wider language of the contract of sale (in this case the sale was declared to be free of all mortgages and covenants) or narrow or wipe out the obligations under the Statute." In this connection, one may with profit consult *Subramania Aiyar* v. *Saminatha Aiyar*,[1] where citing Kent and other authorities it was laid down: "the rule is that inasmuch as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into, even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest." Some such view seems to have prevailed with the Judges of the High Court in this case. That view of the section was not accepted by the Privy Council in *Webb* v. *Macpherson*,[2] where their Lordships say that unlike under the English Law where the vendor's lien is a creation of the court of equity which could be modified to the circumstances of the case by the court, in India. the Statute declares a charge unless excluded by contract and you have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists and that there was no ground whatever for saying that that charge is excluded by mere personal contract to defer payment of a portion of the purchase-money or to take the pur-

1. (1897) I.L.R. 21 M. 69: 7 M.L.J. 319.
2. (1903) I.L.R. 31 C. 57: 30 I.A. 238: 13 M.L.J. 389 (P.C.).

chase-money by instalments nor was it excluded by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. There the question was as regards vendor's charge as to purchase-money—here in respect of the vendor's liability to discharge incumbrances. Clearly, in their Lordships' view, the existence of any covenant in respect of it will not do but there must be some covenant inconsistent with the statutory liability.

SYED KHAN *v.* SYED EBRAHIM, I.L.R. 6 Rang. 169.

The certificate for leave to appeal to His Majesty in Council was ultimately granted by the Court in this case under section 109, clause (*c*), Civil Procedure Code. We are not satisfied that the decision is right in so far as it holds that section 110, Civil Procedure Code, had no application on the facts of the case. The fact that an appeal could have been preferred against the earlier order of 1925 does not conclude the question. As section 105, Civil Procedure Code, does not apply to appeals to His Majesty-in-Council, there is no reason why the validity of the order of remand of 1925 should not be attacked in the appeal against the ultimate decision. In the absence of a provision which makes the earlier order final unless appealed against at that stage, there is nothing to prevent the party from taking all grounds of objection against the decree in the appeal against the ultimate decree in the suit. He may or may not have the right to appeal against the earlier order but the non-appealing against that order at that stage does not conclude the matter against him. In this view, the court was bound to see if the requirements of section 110, Civil Procedure Code, were complied with as regards the value of the subject-matter in dispute, understanding the latter term to include the questions dealt with in and decided by the earlier order.

KUNDAN LAL *v.* BISHESHAR DAYAL, I.L.R. 50 All. 95.

There is much loose thinking in respect of actions for money in the case of sales which have fallen through. Three kinds of actions are possible—action for money had to the use of the plaintiff to which Art. 62 is applicable, for existing consideration failing to which Art. 97 is applicable, action for damages for breach of covenant for title or damages for non-delivery of possession to which Art. 116 is applicable. The remedies on these different kinds of actions are not co-extensive and may not arise on the same set of facts. As pointed out by their Lordships of the Privy Council in *Hanuman Kamut* v. *Hanuman Mandar,*[1] where the sale is voidable at the instance of a junior member of a Mitakshara family, a claim for the return of purchase money is properly a claim on existing consideration failing to which Art. 97 is applicable. If the sale conveyed nothing and was totally void, then the action would be one for money had to the use of the plaintiff. Though no title passed, if possession passes, the action as for existing consideration failing may be brought—deprivation of possession being the date of accruing of the cause of action. (See *Venkatarama Aiyar* v. *Venkatasubrahmanian*[2]). In both these cases, a suit for damages for breach of covenant for title would also lie, the starting point being the date of the sale itself but the damages obtainable would not necessarily be the whole amount of the purchase money. In certain circumstances it might be more, in others less. It is somewhat difficult to understand why or how an action is maintainable for the purchase money itself if the defendant merely failed to deliver possession, and there was no failure of title. The contract having passed beyond the stage of executory contract it is not open to the plaintiff to repudiate the contract of sale and bring an action for money had and received. One should fancy that the only damages recoverable on failure to deliver possession would be mesne profits or costs of action for getting possession if the property was in possession of strangers. In cases where an action for money had and received or as on existing consideration failing may be brought it may be, an action on the covenant for title also might lie as pointed out above, but the relief available on the one kind of action is not quite the same as on the other and there is no good reason why the party should not adopt any particular

1. (1891) 18 I.A. 158.
2. (1899) I.L.R. 24 M. 27: 10 M.L.J. 217.

line of action he considers proper in the circumstances of the case. There is no law which limits a plaintiff in such a situation to one or other kind of action. If a particular kind of action is appropriate under the law, it is no concern of the Court to say that it ought to have been another so as to invite the application of a more rigorous rule of limitation. The judgment under review needlessly confesses helplessness to relieve the plaintiff.

NARSINGH DAS *v.* GOKAL PRASAD, I.L.R. 50 All. 113.

It is laid down in this case that if a witness dies before cross-examination, his evidence is inadmissible. The contrary is laid down in *Maharaja of Kolhapur* v. *Sundaram Aiyar.*[1] The latter view seems to be more in accordance with the English practice though it is agreed to on all hands that the weight attaching to such deposition is slight. There is a similar line of cases relating to affidavits when the deponent is not available for cross-examination.

MATHURA KURMI *v.* JAGDEO SINGH, I.L.R. 50 All. 208.

The Privy Council have laid down in *Raghunath Prasad Singh* v. *Deputy Commissioner of Partabgarh*[2] that the substantial question of law within the meaning of section 110 need not be a question of law of general interest but may be only a substantial question of law between the parties to the suit. While admitting this, their Lordships seem to be straying into the wrong groove when they say that the case is not likely to "afford occasion for the discussion or enumeration of any new principle of law." Having regard to the latest pronouncement of the Privy Council in *Narasingerji* v. *Parthasaradhi Rayanam Garu*[3] it would seem to be rather a strong thing to say that the question on the construction of a document whether it is a mortgage by conditional sale or a sale could involve no substantial question of law.

RAJAH OF RAMNAD *v.* MUTHANAN SERVAI, I.L.R. 51 Mad. 449: 53 M.L.J. 289 (P.C.).

In this case there was great divergence of judicial opinion. The whole thing turned on the Courts' view of a lease transaction by the Ramnad Raja. He gave a lease of a certain village

1. (1924) I.L.R. 48 M. 1.
2. (1927) 54 I.A. 126.
3. (1924) I.L.R. 47 M. 729: 51 I.A. 305: 47 M.L.J. 809 (P.C.).

on a rent of Rs. 420 a year for a fixed period of 30 years. According to the customary rules of distribution of the produce, a certain proportion was taken for payment to the village officers, certain portion for charity and the rest as landlord's share. The lease provided for payment of rent and payment of the share to charity but did not provide as to village officers though the lessee was taking it and handing it over to the village officers. Under Act II of 1894, the Government provided for payment of fixed salary to the village officers, and the question was what under these circumstances, the remedy of the landlord was? The view of the majority in the High Court (see *Tiruneelakantam Servai* v. *Rajah of Ramnad*[1]) was that the landlord's remedy was to have, under section 27 of the Act, the rent raised and that he had no right to sue for the transfer of that share to himself. Their view was that the lease amounted to a transfer of the entire share including the village officers' to the lessee with the liability to the village officers. If the liability disappeared, the benefit of it should go to the lessee and the landlord could not claim the amount. Whatever right the landlord had was under the Statute. Their Lordships differed from the High Court and held that the lease had no such effect, that it did not transfer the right to the village officers' share at all to the lessee his part in the affair being that of an agent. When the liability ceased, he had to make it over to the landlord, for whom he was collecting and in the discharge of whose duty he was disbursing.

SAKALAGUNA NAYUDU *v.* CHINNA MUNISAMI NAYAKAR, I.L.R. 51 Mad. 533: 55 M.L.J. 198 (P.C.).

This judgment of the Privy Council affirms the judgment of the High Court of Madras in *Muniswami Nayudu* v. *Sagalaguna Nayudu*[2] which distinguished *Papa Naidu* v. *Muniswami Aiyar*.[3] The latter case had very little vitality left after it was distinguished in *Muniswami Nayudu* v. *Sagalaguna Nayudu*.[2] Their Lordships recognise the validity, assignability and binding nature of an option to purchase given for consideration under a sale. In *Papa Naidu* v. *Muniswami Aiyar*[3] such an option was treated in slightly different circumstances to be a mere standing offer to sell and revocable before it was followed up by a tender of purchase money.

1. (1922) I.L.R. 46 M. 177: 43 M.L.J. 158.
2. (1926) I.L.R. 49 M. 387: 51 M.L.J. 229.
3. (1923) I.L.R. 46 M. 30: 42 M.L.J. 432.

RAJAGOPALA AIYANGAR *v.* SRINIVASA RAGHAVA IYENGAR, I.L.R. 51 M. 627: 55 M.L.J. 30.

With respect, we agree that on the facts of the case, action was not barred. Section 7 could have no application when there is no person who as managing member could give a discharge without the concurrence of the other member. Where the alienation is by the father and the father is still alive, one of the sons though eldest could not be the manager and could not give a discharge without the concurrence of the other members and as such section 7 could have no application. Mr. Justice Bhashyam Aiyangar clearly points out in *Ahinsa Bibi* v. *Abdul Kader Sahab*[1] the essential conditions for the application of S. 7 to cases like the present. *Vigneswara* v. *Bapaya*[2] is taken by Sir Bhashyam Aiyangar as a case where the elder brother was the managing member, the father having died, though the judgment does not refer to the fact; the reason given in *Vigneswara* v. *Bapaya*[2] is manifestly untenable. The case in *Doraisami Serumadan* v. *Nondisami Saluvan*[3] does not seem to be open to this objection. There it was an alienation by the mother as guardian both the sons being minors and on the attaining of age by the elder of the two sons he became a manager and there is no reason why section 7 should not apply to such a case. The language of Art. 44, it was argued, attracted as consequence the non-applicability of section 7. That is a different question and did not arise in this case. The Privy Council in *Jawahir Singh* v. *Udai Parkash*[4] had nothing to do with the case of the managing member. *Ganga Dayal* v. *Mani Ram*,[5] one of the cases relied upon in the judgment, which was the subject of appeal before the Privy Council, expressly excludes the case of the managing member.

BHOGILAL BHIKACHAND *v.* ROYAL INSURANCE CO., LTD., I.L.R. 6 Rang. 142: 54 M.L.J. 545 (P.C.).

This is an interesting judgment of the Privy Council and specially noteworthy for the observations of their Lordships on several questions of practice and evidence. Section 153 and section 155 of the Indian Evidence Act deal with the question as to how far it is permissible to let in evidence in rebuttal and to

1. (1901) I.L.R. 25 M. 39.
2. (1892) I.L.R. 16 M. 436: 3 M.L.J. 216.
3. (1912) I.L.R. 38 M. 118: 25 M.L.J. 405.
4. (1926) I.L.R. 48 A. 152: 53 I.A. 36: 50 M.L.J. 344 (P.C.).
5. (1908) I.L.R. 31 A. 156.

impeach the veracity of a witness who is examined. Their Lordships observe that these sections must be strictly construed and narrowly interpreted as otherwise the courts will have to embark on an enquiry as to matters that have really no bearing upon the issue in contest between the parties. The question is elaborately discussed in *Attorney-General* v. *Hitchcock*[1] and the learned Judges define with some particularity the exact class of answers which can be contradicted. As in the present case, questions regarding the alleged offer of a bribe to the witness are discussed in that decision. Under section 155, clause (2) evidence is permissible to show that a witness has been bribed or has accepted an offer of a bribe. It is clear that the statement of a witness denying an offer of a bribe to him cannot be contradicted merely by proposing to examine a witness to show that the bribe was offered unless it is further alleged that the bribe was accepted. The mere offer of a bribe to a witness which is not accepted by him does not show any bias or partiality on the part of the witness nor does it affect his credit but it only tends to discredit the testimony of the person who offered the bribe. The case of a demand of a bribe by a witness is clearly different. Similarly also evidence can be let in to show that a person attempted to procure witnesses by offer of a bribe as it tends to show partiality on the part of the witnesses. Their Lordships point out that the evidence in this case of the police officer and the company manager was not improperly received under section 153 and section 155 but that the evidence of the other two persons was not properly receivable under the sections. The judgment under notice further proceeds to deal with the duty of court when it is brought to its notice that an attempt has been made to procure evidence by offers of a bribe.

P. C. THEVAR *v.* V. SAMBAN AND OTHERS, I.L.R. 6 Rang. 188.

The first question raised in this case was whether a suit for a mere declaration that the suit temple and its properties constituted a public trust was sustainable in the absence of sanction under S. 92, Civil Procedure Code. The recent decision of the Privy Council in *Abdur Rahim* v. *Syed Abu Mahomed Barkat Ali Shah*[2] seems to conclude the point in favour of the affirmative answer. The inclination of the judgment under notice the other way is no longer supportable by reference to clause (*h*)

1. (1847) 1 Exch. 91.
2. (1927) 54 M.L.J. 609 (P.C.).

of section 92. The Privy Council point out that section 92 does not require that every suit founded upon any alleged breach of trust created for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of section 92. Only suits claiming any relief specified in sub-section (1) should be instituted in conformity with the provisions of section 92, clause (2). They further point out that clause (*h*) of section 92, clause (1), must be construed on general principles of construction as meaning relief of the same nature as clauses (*a*) to (*g*). The *obiter dictum* of the Judges in the case under review that the suit is not sustainable without the sanction of the Advocate-General is therefore incorrect. The second point raised was whether a suit for a bare declaration without any consequential relief was barred under section 42 of the Specific Relief Act. The judgment holds that as there was no consequential relief prayed for the suit does not lie under section 42 and that apart from that section the Court has no power to pass a declaratory decree. On the latter point, a different view has been taken by the Madras High Court in *Ramakrishna Pattar* v. *Narayana Pattar*[1] relying on the observations of the Privy Council in *Robert Fischer* v. *Secretary of State for India.*[2] Even assuming that the suit must be one strictly coming under section 42 it is not clear that any consequential relief was properly necessary in the circumstances. The decision in *Jamaluddin* v. *Mujtaba Husain and others*[3] recognises that a similar suit for a declaration can be brought to establish the public nature of the trust. It may be noted that the suit in *Abdur Rahim* v. *Syed Abu Mahomed Barkat Ali Shah*[4] was also one where the plaintiffs prayed that "it may be declared that the suit properties may be declared wakf and that the defendants may be restrained from obtaining possession either directly or by realising rents from the said lands." No objection was taken to the frame of the suit and the Privy Council hold that the suit is sustainable.

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1. (1914) I.L.R. 39 M. 80: 27 M.L.J. 634.
2. (1898) I.L.R. 22 M. 270 (P.C.).
3. (1903) I.L.R. 25 A. 631.
4. (1927) 54 M.L.J. 609 (P.C.).

Reilly, J. Cr. Appeal No. 293 of 1928.
18th September, 1928.

Criminal Procedure Code, Sec. 476—Finding that complaint is necessary in the ends of justice—Necessity of—Complaint for an offence committed before the Court and another offence arising out of the same facts—Validity of.

Under Sec. 476, Criminal Procedure Code, it is incumbent on a Court to record a definite finding, after giving reasons therefor, that the complaint is necessary in the ends of justice.

There is nothing in law which prevents a Court from filing a complaint in respect of an offence committed before it along with another offence arising out of the same facts for which under the law no previous sanction is necessary, as for example, fabrication of false evidence and forgery.

V. L. Ethiraj and *A. Lakshmayya* for Appellant.

The Public Prosecutor for the Crown.

N. S.

Madhavan Nair and Thiruvenkatachariar, JJ. C.R.P. No. 586 of 1926.
18th September, 1928.

Civil Procedure Code, Secs. 63 and 73—Attachment by superior Court—Sale by inferior Court and order of rateable distribution—Validity—Dismissal of execution petition to clear off the Court's file—Effect.

Where in ignorance of an attachment of the properties by a Sub-Court, a District Munsif sold the properties in execution of a decree on his own file and distributed the assets to two decree-holders,

Held, that the order of the District Munsif was not without jurisdiction, the irregularity in the sale being cured by the provisions of Sec. 63 (2), Civil Procedure Code, but that the rateable distribution of the assets being in contravention of Sec. 73 could be questioned by the party affected in a fresh suit, as Sec. 63 (2) does not legalise such a wrong payment.

Where an execution application was dismissed by the Court to clear off its file and not on account of any default on the part of the decree-holder, it must be treated as still pending for the purpose of deciding his right to rateable distribution.

T. S. Anantharaman for Petitioner.

B. Somayya, P. Vedachalam Aiyar, E. Krishnamurthi and *K. S. Narayana Aiyar* for Respondent.

N. S.

N R C

Reilly, J. C. R. P. No. 14 of 1928.
19th September, 1928.

*Madras Estates Land Act—*Ex parte *decree in rent suit—Order rejecting application to set aside—Appeal.*

An order rejecting an application to set aside an *ex parte* decree in a rent suit is not appealable.

T. L. Venkatarama Aiyar for Petitioner.

E. Krishna Aiyar for Respondent.

N. S.

The Chief Justice,
Beasley and Mackay, JJ. O. P. No. 129 of 1928.
19th September, 1928.

Income-tax Act, Sec. 10 (2), (3)—Interest payable in respect of thavanai loans—Interest accumulated and paid in a particular year—Amount if can be deducted in assessing the income for that year.

Interest payable on thavanai loans accumulated for a number of years and paid subsequently in a particular year cannot be considered to have been paid during that year so as to entitle the assessee to have that amount deducted in assessing the income, because thavanai loans are in the nature of deposits, the interest accruing in regard to which must be deemed to have been paid and received on the expiry of the thavanai period.

43 M. 629 followed.

M. Patanjali Sastri for Commissioner of Income-tax.

R. Kesava Aiyangar for Assessee.

N. S.

The Chief Justice,
Beasley and Mackay, JJ. O. P. No. 130 of 1928.
19th September, 1928.

Income-tax Act, Sec. 4 (2)—Resident in British India—Separate establishment for wife and children—Assessee coming and residing on a number of occasions.

Where it was proved that the assessee who was a resident of Ceylon had a separate establishment within British India in which his wife and children were living and he himself was coming and residing with his wife and children on a number of occasions during the year of assessment,

Held, that the assessee must be deemed to be a resident of British India and liable for income-tax.

V. V. Srinivasa Aiyangar and *K. S. Rajagopalachari* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

BISHESHAR NATH *v.* CHANDU LAL, I.L.R. 50 All. 321.

With respect, we think, that this judgment is good sense and the only wonder is that there should be so much conflict on this simple matter. Under the English Law, the mortgagee is entitled to pursue all his remedies at the same time; he may sue on the personal covenant; he may sue for sale or foreclosure and he may also apply for the appointment of a receiver. In this country also, there is no question but the mortgagee can sue on the personal covenant alone, the only obstacle being that presented by Order 34, Rule 14, that is to say that he cannot sell the hypotheca in execution of the personal decree. Order 2, Rule 2 is no bar to his subsequently instituting a suit for sale (Order 34, Rule 14). Now if he could pursue the two remedies independently, why should he not combine the two? As Sir Bhashyam Aiyangar has pointed out in *Mallikarjunadu Setti* v. *Lingamurthi Pantulu*[1] there might be difficulty in his way in his so doing by reason of the rules as to venue (Ss. 16 and 20, Civil Procedure Code). Presumably to obviate such reduplication of proceedings, the Civil Procedure Code has provided in Order 34, Rule 6 a mode of providing relief on the personal covenant as well in all cases irrespective of the question whether the defendant is within the jurisdiction of the Court or not and that remedy is available only if the proceeds of the sale turn out to be insufficient—per contra in *Tirumalai Kadirvelusami Naicker* v. *The Eastern Development Corporation Ltd.*[2] But the Courts have largely proceeded on the assumption that the remedy provided under Order 34, Rule 6 is the only remedy available to the mortgagee. That seems to be a gratuitous assumption. As pointed out by the Judges in this case, there is no statutory prohibition against giving a personal decree straightway as the personal covenant—we would add—where having regard to the rules as to venue, such a decree can be passed—unless one could be spelt out from the enacting of Order 34, Rule 6. To us this seems to be an additional remedy and by no means the exclusive remedy though the Court may in its discretion decline to enforce both the remedies at the same time. This question apart, the divergence of judicial opinion has been as to whether the Court would at all give the relief when there has been no sale and further as to what circumstances make the amount legally irrecoverable personally from the mort-

1. (1900) I.L.R. 25 M. 244 at 287: 12 M.L.J. 279 (F.B.).
2. (1917) 33 M.L.J. 382.

gagor even though a personal covenant exists. There was further conflict as to whether a composite decree as it is called declaring liability to be proceeded against personally in the event of the sale proceeds being insufficient. On this last question, the Privy Council has expressed itself in favour of its validity in *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha.*[3] On the second question, some cases hold exoneration of some of the defendants or some of the properties before the suit will affect his right. Others hold that the mortgagee can proceed against such of the mortgagees and such of the mortgage properties as he chooses and that circumstance cannot in any affect his rights. The latter seems to be the sounder view. On the first question, what this case holds and opinion seems to be converging to that point is that when the mortgaged properties or any part of them cannot be sold on account of the failure of title of the mortgagee or on account of any supervenient circumstance, such as revenue sale or sale on a prior mortgage, the mortgagor need not go through the farce of a sale before applying under Order 34, Rule 6. (*Periyasami Kone* v. *Muthia Chettiar,*[4] *Satish Ranjan Das* v. *Mercantile Bank of India, Ltd.,*[5] and *Chand Mall Babu* v. *Ban Behari Bose*[6]). The section does not seem to give the mortgagee power to abandon his claim against the mortgage properties and proceed against the other properties of the mortgagor under this rule. (*Varadiah* v. *Raja Kumara Venkata Perumal,*[7] *Periyasami Kone* v. *Muthia Chettiar*[4] and *Satish Ranjan Das* v. *Mercantile Bank of India, Ltd.*[5]) He cannot pretend to have complied with the section by selling a part and abandoning his claim against the rest (*Arunachala Velan* v. *Venkatarama Aiyar*[8]). In *Srinivasa Aiyangar* v. *Cundaswamy Naiker*[9] it was held that after private purchase of a portion of the properties from some of the judgment-debtors, the decree-holder can proceed against the other properties of the vendors though not against the others. In another case, Mr. Justice Sundar Lal in an Oudh case *Ram Raghubir* v. *Imami Begam*[10] seems to have held that if the mortgagee finds difficulty in selling on account of prior mortgages he might well abandon his remedy against the property and proceed under Order 34, Rule 6. That is practically making the preliminary conditions of the section not essential conditions for

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3. (1918) I.L.R. 47 C. 370 : 46 I.A. 294 : 36 M.L.J. 215 (P.C.).
4. (1913) I.L.R. 38 M. 677.
5. (1917) I.L.R. 45 C. 702.
6. (1923) I.L.R. 50 C. 718.
7. (1913) 26 M.L.J. 83.
8. (1919) 38 M.L.J. 93.
9. (1914) 26 M.L.J. 375.
10. (1909) 9 I.C. 403.

the exercise of jurisdiction but mere considerations for the exercise of the discretion—not impossible view if the original assumption of ours is right and not the contrary.

NARSINGH RAO *v.* MAHALAKSHMI BAI, I.L.R. 50 All. 375 : 55 I.A. 180 : 55 M.L.J. 42 (P.C.).

The question in this case was as to the proper construction of a deed of settlement under which the settlor provided that his wife should own the property as he owned it but that if a son should be born within 16 years to his son who by reason of his misconduct he wanted to disinherit, that son on attaining majority should get the property, on failure of such son, she might appoint the son of her daughter as heir or might adopt somebody but even those persons it was provided should hand over the property to a son that might be born to his son *B* if perchance one should be born after the specified period of 16 years. There was no dispute that if the estate conferred on the wife was an absolute estate subject to defeasance on the birth of a grandson, the condition being invalid under the rule of Hindu Law against gifts in favour of unborn persons, the condition would fail and the absolute estate given to the wife would remain, but the High Court held having regard to the various provisions as to further devolution, etc., that the wife had only an estate limited in duration to the grandson's attaining age and on the contingency happening there was an intestacy and the property should go to the heirs of the settlor. Their Lordships rejected this latter view as it failed to give effect to the dominant intention of the testator of excluding the son. At page 389 their Lordships cite with apparent approval the passage from Mayne which says that property gifted or devised by the husband to the wife would descend to her heirs but that the wife would have no power of alienation in respect of such property. The conception of *Swamya* (ownership) without *Swantantrya* (power of disposition) is familiar to the Mitakshara but seemed to be given the quietus by decisions of the Board in *Surajmani* v. *Rabi Nath Ojha,*[1] *Bhai Das Shivdas* v. *Bai Gulab*[2] and *Ramachandra Rao* v. *Ramachandra Rao.*[3] It is revived again by the observation of the Board in this case. No doubt, those decisions of the Board in the first two cases were given where the word 'malik' occurred and in *Ramachandra*

1. (1907) I.L.R. 30 A. 84 : 35 I.A. 17 : 18 M. L.J. 7 (P.C.).
2. (1921) I.L.R 46 B. 153 : 49 I.A. 1 : 42 M.L.J. 385 (P.C.).
3. (1922) I.L.R. 45 M. 320: 49 I.A. 129: 43 M.L.J. 78 (P.C.).

Rao v. *Ramachandra Rao*[3] the question was not decided as the decision went on a point of *res judicata*. In the recent case from Patna, *Hitendra Singh* v. *Maharajah of Darbhanga*,[4] the point was much discussed in the High Court (see *Hitendra Singh* v. *Maharajadhiraj Sir Rameswar Singh*[5]). Their Lordships on appeal seem to look upon the question as one between life-estate and absolute estate and not one between a heritable estate and a disposable estate and draw attention to section 8 of the Transfer of Property Act and finally hold that the gift to the wife in the case conveyed to her all rights of ownership. The words in the deed will be found to be only "the said Mussamat shall hold possession of the gift properties and enjoy the produce thereof generation after generation and I the executant and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties." "Malik" has been held to confer such power of alienation by implication and the above decision in the Patna case would seem to hold that words of inheritance will have that effect. After that it is difficult to see what words will be held not to include such power when a heritable estate is also intended to be given. If once it is held that certain words include such power, further words restricting alienation will be considered repugnant according to well-recognised rules of construction.

PERUMAL PILLAI *v.* PERUMAL CHETTY, I.L.R. 51 Mad. 701 : 55 M.L.J. 253 (F.B.).

While dealing with *Ali Bahadur Beg* v. *Rafiullah*[6] we pointed out that the view taken in the Madras cases which that case purported to follow required reconsideration in the light of the Privy Council decision in *Lachmi Narain Marwari* v. *Balmakund*.[7] We see that the Full Bench has taken that view and has overruled *Subbarayudu* v. *Ramadasu*,[8] so that after a preliminary decree for sale or redemption failure to bring on record the legal representatives of any deceased party to the suit within the limitation period does not entail as consequence the abatement of the suit. The same rule would apply to partition suits and suits for account.

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3. (1922) I.L.R. 45 M 320· 49 I.A. 129: 43 M.L.J. 78 (P.C.).
4. (1928) L.R. 55 I.A. 197 : A.I.R. (1928) P.C. 112.
5. (1925) I.L.R. 4 Pat. 510.
6 (1926) I.L.R. 49 All. 310.
7. (1924) I.L.R. 4 Pat. 61: 51 I.A. 321: 47 M.L.J. 441 (P.C.).
8. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.

District Board, Sialkot *v.* Sultan Muhammad Khan and others, I.L.R. 9 Lah. 340.

This judgment holds that the profession tax leviable under S. 30 of the Punjab District Boards Act (XX of 1883) can be levied only at a flat rate and that a notification imposing a tax on a graduated scale varying with the income of the person assessed is *ultra vires* as it is really imposing a second income-tax, which the local Legislature cannot authorise without the sanction of the Governor-General in Council. Similar considerations, however, will not be applicable to the profession tax leviable under the Madras District Municipalities Act (V of 1920). The Act itself provides for a graduated scale varying with the income of the assessee, *vide* S. 93 and Schedule IV. The previous Act IV of 1884 (Madras) also authorised such a scale. The judgment under notice seems to have overlooked the distinction between the liability to the tax and the rate of the tax. The class of persons on whom the tax is imposed is defined with respect to the practice of a profession, trade or calling and not to the income which is made by the assessee. Once the persons on whom the liability is cast is thus determined, the rate is fixed with reference to the income. The nature of the tax is in its essence, different from an income-tax.

Naurang Rai *v.* Kidar Nath, I.L.R. 9 Lah. 400.

The provisions of section 345, Criminal Procedure Code, are exhaustive of the right to compound offences. In the absence of a provision in the statute permitting the Court to make an enquiry as to the factum of an alleged compounding of an offence of the class specified in section 345, clause (2) it is difficult to hold that the Court has the power to do so. Specially so as such an agreement is inoperative until the Court sanctions it. It would follow that in such a case as the above where the parties resile from the agreement prior to the granting of the sanction by the Court, there is no purpose in making an enquiry into the disputed question whether there was an agreement to compound. Similar considerations will apply even in respect of the offences under clause (1) under the special circumstances mentioned in sub-clauses (4) and (5) of the section.

Saiyid Mahomed Fariduddin Ahmad *v.* Saiyid Ahmad Abdul Wahab, I.L.R. 7 Pat. 144.

This decision is in direct conflict with the decisions of the Calcutta and the Madras High Courts, see *Subbarami Reddi* v.

Pattabhirama Reddi[1] and the cases referred to therein. No doubt the High Court of Allahabad has taken the view that it is open to the Court under section 34 (*c*) of the Guardians and Wards Act to investigate the accounts exhibited by the guardian and to amend the same by striking out objectionable items and to direct the guardian to pay the balance found due on a just and true account. While it is desirable to have a summary procedure for such remedies subject to a clear provision for appeal, it is difficult to hold that the language of the Act justifies such wide powers. The contrary conclusion that it is only the admitted balance as per the exhibited accounts that can be directed to be paid into Court and that the remedy against the guardian for enforcing his liability on a true and just account after investigation and scrutiny is by a regular suit seems to be the proper view in the light of the policy of the Act and especially so because the words "on those accounts" in section 34 will otherwise be superfluous.

RAMGULAM TELI *v.* KING-EMPEROR, I.L.R. 7 Pat. 205.

There is now a settled divergence of views among the High Courts as regards the stage at which an accused in a criminal case is entitled to get copies of the statements of prosecution witnesses recorded under section 161. The amended section 162 of the Criminal Procedure Code has enlarged the privileges of the accused in the matter. Still some Courts have restricted the right of the accused to get copies (subject to the proviso of section 162) to a late stage of the trial notwithstanding there is nothing in the section itself to justify that view. The Madras High Court held in *In re Peramasami Rayudu*,[2] that it is only after some foundation is laid in cross-examination of a particular prosecution witness that there is some contradiction between the statement in Court and the statement before the police, that the accused can invoke the provisions of section 162. There is nothing in the section to justify that view. A literal reading of the section will make it appear that the accused can call for the copy of the statement *when* any witness is *called* for the prosecution, *i.e.*, when the witness is put into the box by the prosecution. This is the view taken by the present judgment. There is no reason why the plain meaning of the language should not be adopted. The reference to the object of giving the copy to

1. (1926) 51 M.L.J. 249.
2. (1926) 91 I.C. 532: A.I.R. 1926 M. 183.

the accused which is to enable him to contradict the witness under section 145 of the Indian Evidence Act and the difficulties to the prosecution in being asked to give a proof of their case to the accused are not relevant considerations that can be taken into account to justify an additional restriction on the rights of the accused which is not to be found in express terms in the section itself.

SUNDER MULL *v.* SATYA KINKER SAHANA, I.L.R. 7 Pat. 294: 54 M.L.J. 427 (P.C.).

Some misapprehensions likely to be caused by some expressions used by their Lordships in the earlier cases of *Nasir Begam* v. *Rao Raghunath Singh*[1] and *Ram Bujhawan Prasad Singh* v. *Nathu Ram*[2] are cleared by the judgment in this case. The authority of the Karta to borrow on security of family property being limited by proof of necessity, a general plea of "no necessity" puts the onus on the lender to show that both the borrowing and the terms thereof were within the authority. Their Lordships point out that the statement in the first of the two cases mentioned above that that the Karta had authority to borrow only "upon reasonable commercial terms" does not mean that the Court can limit the stipulation for interest only to what may be described as the current rate of interest upon mercantile transactions or to any publicly announced and official rate of interest for loans generally. The expression really means "such terms as can be arranged *freely* between borrower and lender under the circumstances of the particular case." It necessarily follows that the terms of previous borrowings may be relevant evidence in particular cases and their Lordships point out that the observations in the second case do not go so far as to hold that in no case can they be relevant.

It may be noted that the Privy Council take some pains to distinguish the facts of the earlier cases because they observe that "they are binding upon their Lordships and of course must be loyally followed in their application." There are, however, instances where their Lordships have held themselves not bound by previous decisions of the Board. *Baijnath Prasad Singh* v. *Tej Bali Singh*[3] and *Brij Narain Rai* v. *Mangal Prasad Rai*.[4]

1. (1919) L.R. 46 I.A. 145: I.L.R. 41 A. 571: 36 M.L.J. 521 (P.C).
2. (1922) L.R. 50 I.A. 14: I.L.R. 2 Pat. 285: 44 M.L.J. 615 (P.C.).
3. (1921) L.R. 48 I.A. 195: I.L.R. 43 A. 228: 40 M.L.J. 387 (P.C.).
4. (1923) L.R. 51 I.A. 129: I.L.R. 46 A. 95: 46 M.L.J. 23 (P.C.).

C. V. N. C. T. CHIDAMBARAM CHETTIAR *v.* MA NYEIN ME AND OTHERS, I.L.R. 6 Rang. 243.

The rule of succession in the case of a Hindu convert to Mahomedanism was stated by Macnaghten in his Principles of Hindu Law, Vol. II, as follows: "The heirs according to Hindu Law will take all the property which the deceased had at the time of his conversion and the devolution of subsequently acquired property will be governed by the Mahomedan Law." After the passing of the Caste Disabilities Removal Act of 1850 the convert does not lose any of his rights of property and the first part of the rule as stated by Macnaghten will not be correct. Mayne in his Hindu Law and Usage has given reasons for doubting the correctness of the same. The decision under review examines the question in detail in the light of the authorities relied on by Macnaghten as precedents and finally holds that the Hindu relations are not entitled to succeed to any of the properties of the deceased convert. The question of succession will be governed by the law to which the deceased was subject at the time of his death. In the analogous case of a Hindu convert to Christianity, the question has been considered by the Privy Council in *Kamawati* v. *Digbijai Singh*.[1] There can be no doubt, therefore, that even in the present instance the Hindu relations who are not heirs under the Mahomedan Law cannot successfully lay claim to succeed to the properties or share in the same.

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1. (1921) I.L.R. 43 A. 525: 42 M.L.J. 87 (P.C.).

ABDUR RAHIM *v.* MAHOMED BARKAT ALI, I.L.R. 55 Cal. 519: 54 M.L.J. 609 (P.C.).

This decision of their Lordships sets at rest some of the doubts that have been entertained on the construction of section 92 of the Civil Procedure Code . In *Mufti Ali Jafar* v. *Fazal Husain Khan* [1] a division bench of the Allahabad High Court held that a suit by some persons interested in a charity for a declaration that an improper alienation by the trustees of the charity was not binding on the same would not be maintainable without the sanction of the Advocate-General, having regard to the provisions of section 92 of the Code. In that case, the learned Judges did not consider carefully the various clauses of the section or its scope having regard to its previous history under the prior codes of Civil Procedure. The learned Judges were of opinion that all suits based on a breach of a public religious or charitable trust could be brought only in conformity with sub-section (1) of section 92 of the Code and clause (*h*) should be read generally and not *ejusdem generis* with the previous clauses, a view which would render unnecessary the enactment by the Legislature of so many clauses carefully worded having reference to the previous decisions. Their Lordships of the Privy Council have carefully pointed out in the case under notice the limits of the rule laid down in *Vagliano's case*[2] that the previous state of the law should not be considered in the construction of statutes and have come to the conclusion that a suit by some persons interested in a charity for a declaration against the alienees of the charity properties that an improper alienation by the trustee is not binding on the charity and for an injunction against the alienees restraining them from receiving the rents of those properties would be maintainable even though not brought in conformity with the provisions of section 92 (1) of the Civil Procedure Code. This view of their Lordships upholds the Full Bench decision of the Madras High Court in *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[3] which from the arguments, as reported, does not appear to have been cited before the Board. It is somewhat significant that a single Judge of the Madras High Court in *Innasimuthu Pillai* v. *Rev. Lutz*[4] followed the Allahabad decision after distinguishing the Full Bench deci-

1. (1922) I.L.R. 44 A. 622.
2 (1891) A.C. 107.
3 (1916) I.L.R. 40 M 212: 31 M.L.J. 777 (F.B.).
4. (1926) 24 L.W. 286.

sion of the Madras High Court on some ground which is not very clear. The conclusion of their Lordships on this part of the case may be stated to be that section 92 has only reference to and bars suits for the reliefs specified and against the trustees, unless they are brought in the manner provided in sub-section (1). In this view, both the decisions in *Mufti Ali Jafar* v. *Fasal Husain Khan*[1] and *Innasimuthu Pillai* v. *Rev. Lutz*[4] would in effect be overruled.

There is one other point that has to be noticed on this part of the case, namely, whether in a suit brought under section 92 of the Code, a stranger who is an alienee of the trust properties improperly alienated away can be made a party defendant along with the defaulting trustee and any reliefs can be given against him. Before this decision of the Privy Council there has been a considerable body of authority in this country that the alienee cannot be directed in a suit under section 92 of the Civil Procedure Code to deliver possession of the properties to the new trustee appointed under the decree consequent on a declaration of the invalidity of the alienation to him by the defaulting trustee, though it has been held that a declaration can be given in the presence of the purchaser that the alienation in his favour is not binding on the charity and that for the purpose of this declaration, the alienee is a proper party though not a necessary party to a suit under section 92 of the Civil Procedure Code. *See* the judgment of Mookerjee, J., in *Gholam Mowlah* v. *Ali Hafiz*[5] where all the prior decisions are collected and *Ramrup Goshain* v. *Ramdhari Bhagat.*[6] There are also some decisions of the Madras High Court given by Sir John Wallis, C. J., in *Raghavalu Chetty* v. *Pollati Sitamma*[7] and *Rangasami Naidu* v. *Chinnasami Aiyar*[8] to the effect that the alienee is not even a proper party in a suit under section 92 and no declaration can even be granted against him that the alienation to him is not binding on the trust and that the alienee must be removed from the record of the suit as a person who is an improper party to the suit under section 92 to which the only proper defendants would be the trustees of the charity. Again, Sir Lancelot Sanderson, C. J., would, on the construction of Order 1, Rule 3 of the Civil Procedure Code, seem to be inclined to the same view in

1. (1922) I.L.R. 44 A 622.
4. (1926) 24 L.W. 286.
5. (1915) 28 C.L.J. 4.
6. (1925) I.L.R. 47 A 770.
7. (1914) 27 M.L.J. 266.
8. (1915) 28 M.L.J. 326.

Gholam Mowlah v. *Ali Hafiz.*[5] We are not sure whether the presence of both Sir John Wallis and Sir Lancelot Sanderson on the Board who decided the present case is without significance when their Lordships say that no relief can be granted against a third party in a suit under section 92. It may be open to argument hereafter whether their Lordships have not gone the length of holding that the alienee is not even a proper party to a suit under section 92 and that consequently not even a declaration can be granted against the purchaser in such a suit regarding the invalidity of the alienation by the trustee, thus affirming the view of Sir John Wallis, C.J., in *Raghavalu Chetty* v. *Pollati Sitamma*[7] and *Rangasami Naidu* v. *Chinnasami Aiyar*[8] referred to above.

GIRIMONI DASI *v.* TARINI CHARAN POREL, I.L.R. 55 Cal. 538.

In this case a division bench of the Calcutta High Court has held following two prior decisions of a single Judge of that Court in *Dekari Tea Company, Limited* v. *India General Steam Navigation Company, Limited*[9] and *Amarchand Chamaria* v. *Banwari Lal Rakshit*[10] that when an award is passed in an arbitration pending suit, but without any reference through Court, the award cannot be given effect to and passed into a decree of Court under Order 23, Rule 3 of the Civil Procedure Code. Shortly before this decision, a Full Bench of the Bombay High Court in *Chanbasappa* v. *Basavalingayya*[11] went into the question very fully and came to the contrary conclusion holding that the provisions of section 89 of the Civil Procedure Code expressly save the rule enacted in Order 23, Rule 3 and the award can, therefore, be given effect as an adjustment or compromise, even though it may not be assented to by parties subsequently. This decision of the Full Bench was given so shortly before the decision under notice, that it could not have been referred to by the learned Judges in the present case. Again the Bombay decision has been followed by a Full Bench of the Madras High Court in *Subbaraju* v. *Venkataramaraju.*[12] The result, therefore, is that there are Full Bench decisions in Bombay, Madras and Allahabad in *Chanbasappa* v. *Basavalingayya,*[11] *Subbaraju* v. *Venkataramaraju*[12] and *Gajendra Singh*

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5. (1915) 28 C.L.J. 4.
7. (1914) 27 M.L.J. 266.
8. (1915) 28 M.L.J. 326.
9. (1920) 25 C.W.N. 127.
10 (1921) I.L.R. 49 C. 608.
11. (1927) I.L.R. 51 B. 908 (F.B.).
12. (1928) 55 M.L.J. 429 (F.B.).

v. *Durga Kunwar*[13] to the effect that such an award can be given effect to under Order 23, Rule 3 of the Civil Procedure Code. It is not, therefore, unlikely, that when the question comes up again before the Calcutta High Court, it may adopt the conclusion arrived at by the Bombay Full Bench after an exhaustive consideration of the question. It may, however, be remarked that when an award is thus given effect to under Order 23, Rule 3, so long as there is no illegality in the award itself, there seem to be no machinery to question it on the ground of any misconduct of the arbitrator, his partiality or corruption in the course of the arbitration. This would seem to be the result of the observations of Crump, J., in *Chanbasappa* v. *Basavalingayya*,[11] that the word "lawful" in Order 23, Rule 3 has reference to the nature of the compromise arrived at and not to the procedure in arriving at the award. This is one of the difficulties pointed out by Rankin, C. J., in *Amarchand Chamaria* v. *Banwari Lal Rakshit*[10] in the way of giving effect to the award under Order 23, Rule 3 and it is not clear how this difficulty is to be got over.

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10. (1921) I.L.R. 49 C. 608
11. (1927) I.L.R. 51 B. 908 at 948 (F.B.).
13. (1925) I.L.R. 47 A. 637 (F.B).

GOPAL RAM *v.* MAGNI RAM, I.L.R. 7 Pat. 375 (F.B.):

We agree that the order of the District Judge appealed against was really one under S. 43 of Act V of 1920 and the leave of the court was necessary for an appeal against the same, such leave however may be given in proper cases even at the time of the final hearing. The Madras High Court also has taken a similar view in *W. Elliot, Official Receiver, Cuddapah* v. *Mopparapu Subbiah*[1] and *Ananthanarayana Aiyar* v. *Sankaranarayana Aiyar*[2]. There is also a good deal of force in the contention that the order of the High Court admitting the appeal and directing notice to the respondent was virtually one granting the required leave by necessary implication. The observation of the learned Judge that O. 41, R. 11 had no application to the case is however not intelligible, inasmuch as O. 43 makes the provisions of O. 41 applicable so far as may be, in the case of appeals against orders and S. 5 of the Insolvency Act attracts the procedure of the Civil Procedure Code. Apart from that, however, the principle of the ruling of the Privy Council in *Krishna Aiyangar* v. *Nallaperumal Pillai*[3] may well be relied on as justifying the decision on this point.

On the main point decided by the Full Bench, there is a divergence of opinion among the High Courts. While the Calcutta, Lahore and Patna Courts hold that an extension of time under S. 27, clause (2) of Act V of 1920 can be granted even after expiry of the period originally fixed and that, in such circumstances S. 43 of the Act does not compel the Court to annul the adjudication, the Madras High Court takes a contrary view. See *Tirumala Reddi Chinnappa Reddi* v. *Kolakula Thomasu Reddi*[4]. But even in Madras the decisions are not quite uniform. See *Arunagiri Mudaliar* v. *Kandaswami Mudaliar*[5] and *Manikkam Pattar* v. *Nanchappa Chettiar*[6]. We think the view of the Full Bench is the correct one. The discussion as to whether S. 43 is mandatory or directory is really beside the point. It may be granted that if the conditions required for the applicability of S. 43 are found to exist, the Court is bound to annul the adjudication and in this sense the words are mandatory. The real point, however, is whether the applicability of S. 43 cannot be excluded by the granting of

1. (1927) I.L.R. 50 M. 815 : 53 M.L.J. 742. 2. (1923) I.L.R. 47 M. 673.
3. (1919) L.R. 47 I.A. 33 : I.L.R. 43 M. 550 : 38 M.L.J. 444 (P.C.).
4. (1927) 54 M.L.J. 344. 5. (1923) 19 L.W. 418.
6. (1928) M.W.N. 441.

further time under S. 27, clause (2) even on an application filed after the expiry of the period fixed under S. 27. There is nothing in the language of S. 27 to limit the power of the Court to grant an extension of time only to cases where the time fixed has not expired or where an application has been filed before the said period. The language is general and comprehensive enough to include cases of extension even after the expiry of the period fixed. S. 148 of the Civil Procedure Code and the inherent power of the Court recognised by the Privy Council in the case of *Badri Narain* v. *Sheo Koer*[7] are sufficient authority for the same. There is again nothing in the language of S. 43 of the Insolvency Act which makes the application of S. 148 of the Civil Procedure Code by reference to S. 5 of the Act inapplicable or inconsistent with the terms or objects of the Act. The assumption that an annulment of adjudication is in all cases a punishment of the defaulting insolvent is incorrect. Cases are conceivable where the annulment of the adjudication order is really of benefit to the insolvent and some of the creditors whom he might have fraudulently preferred and it may be that in those cases an annulment of adjudication may really operate to the detriment of the majority of creditors. The vesting of the properties of the insolvent under S. 37 in some third parties may not always be an adequate safeguard. An annulment may prevent the starting of proceedings under Ss. 53 and 54, to avoid fraudulent transfers and preferences by the insolvent. In view of the time limit fixed by the sections a fresh adjudication by the creditors may not give them the same advantages. While perhaps in the case of transfers in fraud of creditors, the creditors may take proceedings under S. 53 the hardship is undoubted in the case of fraudulent preferences as these can be avoided only under the Bankruptcy Laws and within the time limited. The decision of the Sindh Court in *Saligram* v. *Official Receiver*[8] is instructive on the point under discussion.

JIJIBHOY N. SURTY *v.* T. S. CHETTYAR FIRM, L. R. 55 I.A. 161 : I.L.R. 6 Rang. 302 : 54 M.L.J. 696 (P.C.).

This decision of the Privy Council sets at rest the conflict of views in the High Courts as regards the construction of S. 12 of the Limitation Act (IX of 1908). Their Lordships

7. (1889) I.L.R. 17 C. 512 (P.C.).
8. (1925) 91 I.C. 467.

overrule the view that the time taken for obtaining copies of judgment and decree can be excluded only if the said documents are required to be filed along with the memorandum of appeal. Even if the rules of the Court do not require the said documents to be filed along with the memorandum of appeal, the time properly taken to obtain them must be excluded as S. 12 does not say why the time is excluded but simply enacts it as a positive direction. There may well be other reasons why the legislature provides for the exclusion of the said period. The authority of the decisions of the Madras High Court in *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*[1] and *Abu Backer Sahib* v. *Secretary of State*[2] in so far as they proceed on the construction of S. 12 is specifically rejected. The decision of the Full Bench in *Fazal Muhammad* v. *Phul Kuar*[3] is explained away as not a decision under the Limitation Act. This will be correct only if it is understood that the period of limitation was not one fixed under the Limitation Act. The statement of their Lordships that the clause in the Letters Patent which conferred the right of appeal fixed its own period for the same is however inaccurate as the period for preferring the Letters Patent Appeal was regulated not by the Letters Patent itself but by the rules of practice of the High Court which provided that all such appeals should be preferred "within ninety days unless the Court in its discretion on good cause shown shall grant further time." No doubt it has been held that the period of time fixed by any special enactment which is a complete Code in itself cannot be affected by reference to the general provisions of the Limitation Act. An instance of this will be found in the decision of the Privy Council in *Muhammad Bahadur Khan* v. *The Collector of Bareilly*[4]. It is difficult to hold the case in *Fazal Muhammad* v. *Phul Kuar*[3] came under the principle of the above ruling. It must, therefore, be now taken that the decision in the Allahabad Full Bench case is really erroneous, though their Lordships do not say so in so many terms but seem to exclude that case from their consideration as belonging to a different type altogether. The Madras High Court has, relying on the principle of the decision in *Muhammad Bahadur Khan* v. *The Collector of Bareilly*[4], held that the Indian Registration Act and the Madras Forest Act are special Acts complete in themselves and the general provisions of the Limitation Act do

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1. (1897) I.L.R. 20 M. 476.
2. (1909) I.L.R. 34 M 505 : 20 M.L.J. 283 (F.B.).
3. (1879) I.L.R. 2 A. 192 (F.B.). 4. (1874) L.R. 1 I.A. 167.

not apply to proceedings thereunder. See *Veeramma* v. *Abbiah*[1] and *Abu Backer Sahib* v. *Secretary of State for India*[2]. Reference may also be made to *Srinivasa Aiyangar* v. *Secretary of State for India*[6] and to *Lingayya* v. *Chinna Narayana*[7] where similar questions arose with reference to the Madras Revenue Recovery Act, II of 1864 and to the Provincial Insolvency Act, III of 1907. The decision of their Lordships, however, does not deal with the question whether the general provisions of the Limitation Act can be applied to the case of proceedings under special enactments which are not complete codes and therefore self-contained. Their Lordships, however, point out in their judgment that S. 12 makes no reference to the Code of Civil Procedure or to any other Act. It is significant that the legislature has now altered the terms of S. 29 of the Limitation Act IX of 1908 by Act X of 1922. In view of this legislative modification, the decision in *Lingayya* v. *Chinna Narayana*[7] is no longer of authority. Apart from the true interpretation of S. 12 of the Limitation Act the matter is concluded by the express terms of S. 29, clause (2) of the Limitation Act as it now stands after the modification by Act X of 1922. There is, however, no reference to the same either in the judgment of the High Court or of the Privy Council. The argument seems to have proceeded upon the footing that assuming that S. 12 applies on its true construction it does not apply to cases where the two documents referred to are not required for being filed along with the memorandum of appeal and that the time taken for obtaining them is not "requisite" within the meaning of the section. It is this contention which is rejected by the Privy Council. It may also be noted that the rules framed by the Rangoon High Court in respect of appeals against decrees passed in exercise of its original jurisdiction dispense with production of the certified copy of the decree only and that ordinarily a certified copy of the judgment should be filed along with the memorandum of appeal unless there is a special order dispensing with that also. It would therefore seem to follow that the time taken for obtaining a copy of the judgment should in any event have been excluded but the point is immaterial as on the true view of S. 12, even the time requisite for obtaining a copy of the decree as well should be excluded.

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2. (1909) I.L.R. 34 M 505 . 20 M.L.J. 283 (F.B.).
5. (1894) I.L.R. 18 M. 99 (F.B.).
6. (1912) I.L.R. 38 M. 92 · 24 M.L.J. 41.
7. (1917) I.L.R. 41 M. 169 : 33 M.L.J. 566 (F.B.).

PEARE MOHAN PRASAD *v.* RAGHUNATH LAL, I.L.R. 50 All. 259.

The Allahabad High Court cannot reconcile itself to a decree-holder not *certifying* payment before the time for execution expires, being allowed to use the payment by certifying the payment in the application for execution. There is no rule of limitation prescribing a time within which certifying by the decree-holder should take place. The prohibition as to evidence of payment is only in the absence of a certificate. The earlier Allahabad cases make the mistake of thinking that recording is essential before payments can be recognised in execution. Even so, the earlier Allahabad cases would not prohibit certifying after the execution is barred that is apart from the payment—all that they insisted upon was that the certifying must precede the application for execution. That is a mere technicality for it can be easily avoided by putting in a certificate first and the execution application next on the same day. These weak points in the argument of the Allahabad High Court are noticed by Mr. Justice Mukherjee who inclines to the view of the other High Courts. Mr. Justice Ashworth suggests a new justification for the Allahabad view. He thinks that the effect of the provision that the executing Court cannot recognise uncertified payment is that the execution Court must compute limitation from the date not of payment but of certification. To recognise a payment not certified before the decree became barred would be, in effect, according to him giving recognition to uncertified payment. This is tantamount to adding a new clause of limitation by analogy or implication which is certainly not permissible for the Courts to do.

JAISTH MADHO *v.* THAKUR SRI GAT, I.L.R. 50 All. 265.

This is a curious application we should rather think misapplication of *Vidya Varudhi* v. *Balusami Aiyar.*[1] No doubt that case is authority for saying that the property of the temple or mutt dedicated for the general purposes of the mutt or temple does not *vest* in the Matadhipathi or Manager so as to attract the application of Art. 134 or section 10 of the Limitation Act. But that is hardly a justification for holding that the amounts received by the manager whose position is recognised to be fiduciary and coming within the scope of section 92 of the Civil Procedure Act should be governed by

1. (1921) I.L.R. 44 M. 831: 41 M.L.J. 346 (P.C.).

Art. 62 of the Limitation Act. The appropriate article we should think in such a case would be Art. 120—the cause of action accruing from the date of the termination of the managership or if the managership is continuing, when there has been a demand and refusal. (*Yerukola* v. *Yerukola*.[2]) He being the manager of the institution, his receipt was rightful and his possession also was rightful. No sort of cause of action against him arose on the receipt by him except the right to have it accounted for when demand was made on behalf of the deity by some person duly authorised in that behalf. If his position is not that of a trustee, it was that of an agent to whose case Art. 85 would be the appropriate article applicable.

ISHRI PRASAD *v.* SRI RAM, I.L.R. 50 All. 270.

This case is one just on the line and necessarily one involving a lot of difficulty. A foreign judgment given on default without taking evidence is one not given on the merits within the meaning of Section 13, Civil Procedure Code. Is a judgment not given on evidence but purporting to be on the merits—would that be one on the merits? So far as that section is concerned, it is not what the Court purports to do that is material but what it has done seeing that no evidence of any sort was taken. The conclusion being one based upon the fact that the document was registered and that the defendant did not appear though served, it is rather difficult to say that the judgment is one rendered on the merits. If a judgment given *ex parte* in the absence of the defendant though on evidence, could be so regarded is itself not a settled point. (See *Mahomed Kassim & Co.* v. *Seeni Pakir Bin Ahmed*[3].)

EQUITABLE TRUST COMPANY *v.* HAFIZ MUHAMMAD, I.L.R. 50 All. 276.

On the question as to whether interlocutory order such as refusing to add parties would come within Section 115, Civil Procedure Code, there is a sharp difference of opinion between the various High Courts, on the one side the Calcutta, Bombay, Patna, Madras and Rangoon High Courts, on the other the Allahabad and Lahore High Courts. *Umed Lal* v. *Chand Mal*[4]

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2. (1922) I.L.R. 45 M. 648: 42 M.L.J. 507 (F.B.).
3. (1925) I.L.R. 50 M. 261: 52 M.L.J. 240 (F.B.).
4. (1926) I.L.R. 54 C. 338: 52 M.L.J. 368 (P.C.).

referred to and distinguished in this case is clear authority for the position that a question as to addition of parties might involve a question of material irregularity or jurisdiction so as to bring the case within section 115, Civil Procedure Code. But it is equally true as pointed out in this case that the question at issue in this case, *viz.*, as to whether the order refusing to make a person a party could be revised did not arise in that case as the revision was against the decree in a case in which no appeal lay on the ground that deciding the suit in the absence of the parties interested vitiated the judgment, the judgment was reversed and the suit was dismissed and this order was upheld by the Privy Council.

DORAISAMI GURUKAL *v.* SUBRAMANYA GURUKAL, I.L.R. 51 Mad. 266: 54 M.L.J. 361.

Rent means whatever lawfully payable in money or in kind or both to a landholder for the use or occupation of land in his estate for the purpose of agriculture and includes whatever is payable on account of water supplied or taken—S. 3, clause (11). Clause (15) contemplates a rent legally due on land. No doubt rent may not be enhanced except as provided in the Act but any question of enhancement would arise only if there is a legal lower rate.

Section 28 raises a presumption that the rate being paid is the lawful rate but is rebuttable. The rate paid may be less than the proper rate under section 25 for any of the reasons referred to in section 26. A return to the original rate in cases permissible under section 26 would not be an enhancement prohibited by the Act. Or again, the rate might be all right but the area might be wrongly given. In such a case, charging rent for the area left out is not considered enhancement by the Act, so that it is perfectly clear that all raising of the previously paid rent is not enhancement but only raising the lawfully payable rent is such. Accordingly if there is no definite rent on the land irrespective of the crops raised but only a crop war rent then a variation of the rent according to the crop though in fact the rent charged is higher rent than that previously charged is not enhanced rent. Viewed from that point of view, charging for water taken to which the tenant is not entitled does not constitute an enhancement. It is a charge for something to which he is not entitled according to the terms of the lease but which he has taken and for which he is bound

to pay. It would not come within clause (30). As Mr. Justice Ramesam observes the landlord would be remediless if the view put forward by Mr. Justice Curgenven which appealed to Mr. Justice Jackson was accepted. It is not an altogether irrelevant circumstance but we think the sections referred to by us do justify the construction put by the majority on the Act.

SUBBARAJU *v.* VENKATARAMARAJU, I.L.R. 51 Mad. 800: 55 M.L.J. 429 (F.B.).

The Madras High Court has been uniformly holding that an award on a reference pending suit without the intervention of the Court may be made a decree of Court under Order 23, Rule 3. The various provisions of the Civil Procedure Code under which defects in the award can be remedied would not obviously be available in such a case. As to what are the limitations subject to which the award can be made into a decree of Court, there is no authoritative decision. Misconduct of the arbitrators, there is no doubt, would be an invalidating circumstance but whether not all interested persons being parties to the reference, or matters outside suit or persons not parties being included in the reference, are objections available, there is no authority but observations in *Nanjappa* v. *Nanjappa Rao*[1] would seem to point to the contrary. That the same document should lead to a decree if application is made under one section and not, if made under another would undoubtedly seem to be an anomaly and it is also difficult to understand the object of enacting section 89 but notwithstanding the provisions of the code relating to the filing of awards passed without the intervention of the Court, there is nothing to prevent parties suing upon awards or of pleading awards in defence to actions and so long as that can be done, it can be no great objection that a particular species of them passed during suits should similarly afford grounds of defence.

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1. (1912) 23 M. L.J. 290.

Kamala Prosad Sukul *v.* Kishori Mohan Pramanik, I.L.R. 55 Cal. 666.

This decision deals with the liability of joint tort-feasors and the effect, on the maintainability of an appeal by reason of the non-joinder in the appeal of some of the joint tort-feasors against whom a judgment was obtained in the lower Court. The learned Judges have held that in such a case, the appeal would not be maintainable and could not proceed to judgment on the merits.

It is well-settled law that the liability of joint tort-feasors is joint and several in its nature. We venture to think all that the learned Judges mean when they say that this is not an inflexible rule is that when they are not joint tort-feasors in the strict sense of the term as when by their independent action and without a common design an injury is caused to a third person, then the rule has no application and there is in reality in such cases only separate torts and not a joint tort and consequently there is only a several liability. This aspect of the question was clearly discussed by the Court of Appeal in *The Koursk*[1] where by the independent negligent acts of two steamers a third steamer was injured and it was held that those two were not joint tort-feasors and a judgment obtained against one of them would not bar an action against the other.

Coming to the case of joint tort-feasors, the learned Judges have held, following the leading case of *Brinsmead* v. *Harrison*[2] and the other English cases, that a judgment obtained against any one of them is, even in the absence of satisfaction, a bar to an action on the tort against the others. This rule seems to have been rested in England more on *stare decisis* than on any clear intelligible principle. Indeed Montague Smith, J., in *Brinsmead* v. *Harrison*[3] says that if the matter were *res integra,* he would be inclined to take the opposite view that until satisfaction a judgment against one joint tort-feasor would not bar an action against another. This seems to be the rule in the United States where the same system of law is administered. Willes, J., in the same case puts it as a rule of procedure which, if it were only such, would not apply to this country. In the same case Kelly, C.B., would base it on a principle of *transit in rem judicatam;* but it is not easy to realise the force of it in the case of a joint and several liability, whatever may be its force in the case of joint liability. In this connection we would draw attention to

1. (1924) P. 140. 2. (1872) L. R. 7 C. P. 547.
3. (1871) L. R. 6 C. P. 584.

the observations on the principle of *transit in rem judicatam*, by Lord Penzance in *Kendall* v. *Hamilton*[4], even with reference to joint liability.

In the case of contracts where there is a joint and several liability, it has been the accepted law, that a judgment against one of the joint contractors without satisfaction would not bar an action against the others, *King* v. *Hoare*[5]. The rule of *transit in rem judicatam* does not therefore really seem to affect the question. The decision in *Brown* v. *Wootton*[6] would put it that in the case of joint tort-feasors, an uncertain liability is made certain by the judgment against one of the joint tort-feasors and that this distinguishes it from the case of a joint and several contract where the damages are certain. This distinction does not seem to proceed on any legal principle. It therefore remains that the decision in *Brinsmead* v. *Harrison*[2] rests on *stare decisis* from the case of *Brown* v. *Wootton*[6]. It is interesting to note that Bankes, L. J., in *The Koursk*[1] did not apparently feel satisfied about the variety of reasons given for the rule in *Brinsmead* v. *Harrison*[2]. As for the rule of convenience, at least as much can be said against the rule laid down in the case, as in its favour. It may therefore be that when the matter comes to be examined on principle in this country the Courts may consider whether the English rule has to be adopted or the rule adopted in America, and which has been applied even in England in the case of joint and several liability in the case of contracts.

Again, the decision of the question has not been rested in the English Cases, on any view of the right of contribution as between the joint tort-feasors and it may well be presumed that the one has no necessary connection with the other, as can be seen from the case of joint and several contractors in which case, there is a right of contribution but still a judgment against one is not a bar to a suit against the others.

It remains to notice, that the observations of the learned Judges at page 672, that the rule in *King* v. *Hoare*[5], has been held applicable to the case of joint debtors in this country are by no means clear. The weight of authority in this country, as we understand it, is that, by reason of the enactment of S. 43 of the Indian Contract Act, all joint promises are, in the absence of a contract to the contrary, joint and several in their nature. That this is the effect of section 43 is

1. (1924) P 140. 2. (1872) L R 7 C. P. 547.
4. (1879) 4 A.C. 504 at 525-529. 5. (1845) 13 M. & W. 494.
6. (1605) Cro. Jac. 73 : 79 E. R. 62.

the opinion of Sir Frederick Pollock, in his commentaries on the Indian Contract Act and the same was laid down in *Muhammad Askari* v. *Radha Ram Singh*[7] after a careful examination of the authorities. This decision has been generally followed by the other High Courts. See *Ramanjulu Naidu* v. *Aravamudu Aiyangar*[8], *Mool Chand* v. *Alwar Chetty*[9], *Motilal Bechardass* v. *Chellabhai Hariram*[10], *Raghunath Dass* v. *Baleswar Prasad Chaudhuri*[11] and *Krishna Dass Roy* v. *Kali Tara Chowdhurani*[12]. In this view, the rule in *King* v. *Hoare*[5] which is based on a joint liability under a contract and not a joint and several liability has no application in this country. Baron Parke in *King* v. *Hoare*[5] pointed out that in the case of a joint and several liability under a contract, a judgment without satisfaction against one of the debtors would not bar another action on the contract against the others. The observations of the learned Judges would thus not seem to represent the result of the decisions on this question, although there is no direct decision of the Privy Council on the matter and some recent decisions of the Bombay High Court have taken a different view of section 43 of the Contract Act.

KISHAN SINGH *v.* THE KING-EMPEROR, I.L.R. 50 All. 722 : 55 M.L.J. 786 (P.C.).

The question in this case was whether on an application for revision by the Government, the High Court can alter a conviction on culpable homicide into one for murder when on the latter charge he had been acquitted and there is no appeal so far as that conviction is concerned. Their Lordships hold that it cannot. Section 439, Cl. (14) is perfectly clear that the High Court cannot convert, while acting under that section, a finding of acquittal into one of conviction. But the High Court of Madras in *Re Bali Reddi*[13] held that that clause only applies when there has been a complete acquittal and not when there is merely an acquittal on one of the charges. Their Lordships dissent from this view. Their Lordships do not however express an opinion on the question whether in the circumstances of that case, the decision was right. In that case there was an acquittal on the charge of murder and a conviction on a charge of rioting and the accused

5. (1845) 13 M. & W. 494.
7. (1900) I.L.R. 22 A. 307.
8. (1909) I.L.R. 33 M. 317.
9. (1915) I.L.R. 39 M. 548.
10. (1892) I.L.R. 17 B. 6.
11. (1927) I.L.R. 7 Pat. 353.
12. (1917) 22 C.W.N. 289.
13. (1913) I.L.R. 37 M. 119.

had appealed against the conviction and the High Court had given notice of enhancement. On the appeal their Lordships altered the conviction into one of murder and purported to enhance the sentence under S. 439, that is to say, they did not purport to alter the acquittal into one of conviction on the revision but only enhanced the sentence under that section. As to the legality of this course, their Lordships express no opinion.

QUADRI JAHAN BEGAM *v.* FAZAL AHMAD, I.L.R. 50 All. 748.

The Allahabad High Court held under the old Code that when a compromise is brought to the notice of the Court by one party but is denied by the other, it is not bound to investigate the question. The Legislature has overruled that view. In this decision, it holds that the Court cannot inquire under O. 23, R. 3, into the question whether the compromise is vitiated by fraud—in its view, the use of the word "lawful" makes it clear that only the question of legality of the compromise can be considered. We think that this is a wholly gratuitous assumption and is to be deprecated as it imputes to the Legislature an intention to multiply proceedings for no conceivable reason. The language of section 23 of the Contract Act is different and we do not quite see why a compromise vitiated by fraud or unsupported by consideration should be regarded as a *lawful* compromise.

[END OF VOLUME LV.]

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NOTES OF RECENT CASES.

Madhavan Nair and Jackson, JJ.
2nd May, 1928.

C.M.A. No. 559 of 1925 and C.M.A. No. 70 of 1926.

Civil Procedure Code, O. 21, Rr. 66 and 69—Sale without fresh proclamation—Waiver by judgment-debtor—Non-mention of the upset price—If a material irregularity.

Failure to publish the sale proclamation is not an illegality vitiating the sale but an irregularity which can be waived by the judgment-debtor.

Omission to state upset price in the sale proclamation is not a material irregularity or fraud under O. 21, R. 90.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellants.

K. V. Krishnaswami Aiyar and *V. Rajagopala Aiyar* for Respondents.

N. S.

The Chief Justice, Beasley and Madhavan Nair, JJ.
7th May, 1928.

Ref. Case No. 19 of 1927.

Indian Income-tax Act (1922), *S.* 10 (2) (*iii*)—*Borrowed capital—Failure of the business—Interest whether deductible.*

Where a person carrying on banking business borrows money and invests it in a separate piecegoods business and that business subsequently fails and the sum invested is lost,

Held, the interest on the borrowed money must be deducted under S. 10 (2) (*iii*) in computing the profits and gains of the banking business.

K. V. Krishnaswami Aiyar and *V. Rajagopala Aiyar* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

Ramesam, J. Cr. M. P. No. 350 of 1928.
28th June, 1928.

Criminal Procedure Code, Ss. 435 *and* 439—*Complaint for the offence of perjury—Complaint not disclosing the facts necessary to constitute the offence—Power of High Court to quash proceedings.*

Where a complaint was preferred under S. 476, Criminal Procedure Code, by the 1st Class Magistrate against the petitioner for the offence of giving false evidence and the complaint on the face of it did not contain the several facts to constitute the offence,

Held, the High Court had powers to interfere and quash the proceedings as no case had been made out.

39 M. 561 referred to.

K. S. Jayarama Aiyar and *V. Rajagopala Aiyar* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Wallace, J. C. R. P. No. 510 of 1927.
18th July, 1928.

Material alteration—Promissory note—One of the executants not a marksman but a signatory—Putting on his mark—If amounts to material alteration.

Where it was found that, though a promissory note purported to be executed by two persons, it bore only the mark of one of them who was not a marksman but a signatory, and the plaintiff was also a party to the fraudulent getting up of the note as if executed by that person by affixture of his mark thereto,

Held, that it amounted to material alteration of the promissory note so as to disentitle the plaintiff from getting a decree even against the other admitted executant of the pronote.

26 M.L.J. 257 followed.

A.I.R. 1925 Mad. 929 not followed.

K. Venkateswaran for Petitioner.

T. M. Ramaswami Aiyar for Respondent.

N. S.

Reilly, J. S. A. No. 206 of 1927.
18th July, 1928.

Civil Procedure Code, O. 22, *R.* 4—*Death of respondent in appeal—Some only of the legal representatives added within the period of limitation—Effect.*

Where, on the death of a respondent in an appeal, some only of his legal representatives were brought on record within the period of limitation,

Held, that the estate must be deemed to have been sufficiently represented by them and the appeal did not abate either as against the legal representatives added within the period of limitation or against the other legal representatives.

V. Ramaswami Aiyar for *K. Rajah Aiyar* for Appellant.

Ch. Raghava Rao and *A. K. Ramachandra Aiyar* for Respondent

N. S.

Reilly, J. S. A. No. 755 of 1925.
25th July, 1928.

Negotiable Instruments Act, S. 27—Promissory note—Execution by a partner of a firm—Recital that amount borrowed for the purpose of the firm—Personal liability of the partner who did not sign.

Where a promissory note was executed by one partner only of a firm in favour of the plaintiff and the note contained a recital to the effect that the debt was for the purpose of the business of the firm,

Held, the partner who did not sign the promissory note was also personally liable.

17 M.L.J. 126; 46 C. 663 (P. C.) referred to.

K. V. Krishnaswami Aiyar for Appellant.

S. Varadachariar and *S. V. Venugopalachariar* for Respondent.

N. S.

Wallace, J S. A. No. 124 of 1925.
26th July, 1928.

Partnership—Execution by one partner of a mortgage bond in favour of the firm—Another partner receiving the mortgage bond on settlement of accounts without actual assignment—Suit by the latter on the mortgage bond—Maintainability.

Where a mortgage bond was executed by a partner of the firm in favour of the firm and the bond was simply handed over to another partner in respect of his share on the termination of the partnership and settlement of accounts without being actually assigned to him, and the latter instituted a suit on the mortgage,

Held, that the suit was maintainable even though there was no assignment as contemplated by S. 30 of the T. P. Act.

11 M. L. T. 246 referred to.

T. V. Venkatarama Aiyar for Appellant.

K. S. Krishnaswami Aiyangar and *K. S. Champakesa Aiyangar* for Respondent.

N. S.

Curgenven, J.
27th July, 1928.

Cr. M. P. No. 458 of 1928.

Criminal Procedure Code, S. 177—Commitment to a Court not having jurisdiction—Validity—Transfer.

A commitment order to a Sessions Court within whose jurisdiction the alleged offence did not take place is bad and must be quashed. The High Court had no jurisdiction to transfer the case to the Court of right jurisdiction.

36 M. 387 followed.

T. R. Venkatarama Sastri for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Reilly, J.
27th July, 1928.

S. A. Nos. 751, 884 to 886 of 1924.

Madras Abkari Act—Partnership with sole licensee—Legality—Suit for dissolution of partnership—Plea of illegality by one defendant—Whether res judicata *as against other defendant.*

A partnership with a person holding a licence under the Madras Abkari Act to sell toddy is not *prima facie* illegal, there being nothing in the Act itself prohibiting it. Case-law reviewed.

(1910) M. W. N. 549 and 51 M. L. J. 12 referred to.

Where only one of the two defendants in a suit for dissolution of partnership raises the plea of illegality of the partnership, the other defendant resisting the suit on other pleas, and the suit is dismissed on the plea of illegality, the decision as to illegality is not *res judicata* as between the plaintiff and the other defendant.

P. Somasundaram for Appellant in S. A. No. 751 and Respondent in S. A. Nos. 884 and 886 of 1924.

B. Satyanarayana (*K. Bhimasankaram* with him) for Respondent in S. A. No. 751 and Appellant in S. A. Nos. 884 to 886 of 1924.

N. S.

Curgenven, J.
30th July, 1928.

C. M. P. No. 1214 of 1928.

Letters Patent (Madras), cl. 18—Insolvency petition under the Provincial Insolvency Act—Application for transfer of the petition to the High Court—Jurisdiction of the High Court.

Under cl. 18 of the Letters Patent, a Judge of the High Court sitting in Insolvency has no jurisdiction to try an insolvency petition under the Provincial Insolvency Act, and the High Court is not competent to transfer an insolvency petition filed under the Provincial Insolvency Act.

25 M. L. J. 299 followed.

O. Thanikachalam Chetti for Petitioner.

G. T. Ramanujachari for Respondent.

N. S.

The Chief Justice and Pakenham Walsh, J.
31st July, 1928.

Cr. Rev. Case No. 451 of 1928.

Criminal Procedure Code, S. 488—Maintenance order—Execution of—Jurisdiction of the Court passing the order when the party lives outside the jurisdiction of that Court.

The Court which passed the order of maintenance has jurisdiction to execute the same by the issue of a warrant even though the person against whom execution is sought is not within the Court's jurisdiction.

K. Sankara Sastri for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Devadoss and Mackay, JJ.
31st July, 1928.

Appeal No. 95 of 1927.

Income-tax Act, S. 67—Income arising from fisheries and forest revenue—Assessment of—Assessee's payment of the tax—Mistake of law—Maintainability of suit for recovery of tax paid.

The assessee who was the owner of a permanently settled estate governed by the Permanent Settlement Regulation, paid income-tax on income arising from fisheries and forest revenue under a *bona fide* impression that he was bound to pay income-tax on such income. In a suit against the Government for the recovery of the amount paid.

Held, that the payment was made under a mistake of law and could not be recovered.

Held also that in respect of assessments which were clearly '*ultra vires*' S. 67 of the Income-tax Act would not be a bar to the maintainability of a suit in a Civil Court.

N R C

A. Krishnaswami Aiyar and *R. Ramamurthi* for Appellants.

The Government Pleader for Respondent.

N. S.

Kumaraswami Sastri, J. Appln. No. 503 of 1927.
31st July, 1928.

Damages—Right to recover—Assignability.

A right to recover damages cannot be assigned.

K. S. Krishnaswami Aiyangar for Applicant.

Sir C. P. Ramaswami Aiyar and *D. R. Venkatesa Aiyar* for Respondent.

N. S.

Devadoss and Mackay, JJ. A. S. No. 175 of 1923.
31st July, 1928.

Religious endowment—Office of Dharmakartaship—Whether alienable.

The office of Dharmakartaship is inalienable.

A. Krishnaswami Aiyar for Appellants.

G. Lakshmanna and *Y. Govindarajalu* for Respondents.

N. S.

Curgenven, J. Cr. Rev. Case No. 35 of 1928.
1st August, 1928.

Criminal Procedure Code, S. 256—Magistrate asking the accused to cross-examine prosecution witnesses immediately after framing charge—Reasons for such procedure—Failure to record —Legality.

Failure to record reasons by the Magistrate for asking the accused to cross-examine the prosecution witnesses immediately after framing a charge against him, amounts to an illegality vitiating the trial.

50 M. 740 followed.

V. L. Ethiraj for Petitioner.

K. Venkatraghavachari for Public Prosecutor.

N. S.

The Chief Justice and Pakenham Walsh, J. Cr. Appeal No. 51 of 1928.
1st August, 1928.

Evidence Act, S. 143—Leading questions in cross-examination —Refusal of the Judge to allow—Legality.

The refusal of a Judge to allow the vakil to put leading questions in cross-examination is illegal and vitiates the whole proceeding.

V. L. Ethiraj and *N. Somasundaram* for Appellant.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice, Ramesam and Pakenham Walsh, JJ. Ref. Case No. 10 of 1927.
2nd August, 1928.

Indian Stamp Act—Applicability to scheduled districts and Agency Tracts.

The Indian Stamp Act, which applies to the whole of British India by virtue of the provisions of S. 3 (7) of the General Clauses Act is in force in the Agency Tracts and scheduled districts.

P. Venkataramana Rao for the Government.

B. Satyanarayana for the Party.

N. S.

Wallace, J. S. A. No. 216 of 1927.
2nd August, 1928.

Malabar Law—Putravakasam *property—Seniormost female—Right of management—Demise before expiry of period—Validity.*

(1) Property given by a husband to a wife and children is *putravakasam* and not *strisottu.*

(2) There is nothing in Malabar Law or usage against a female managing such properties.

(3) Demises granted by such manager before the expiry of the periods under prior demises are invalid.

K. P. M. Menon and *A. S. Srinivasa Aiyar* for Appellants.

P. Govinda Menon for Respondents.

N. S.

Kumaraswami Sastri, J. C. S. No. 227 of 1928.
2nd August, 1928.

Receiver—Appointment of—Suit upon simple mortgage.

The Court cannot appoint a receiver in a suit upon a simple mortgage, as the relief for possession, which the Court has no power to grant even by way of decree in the suit cannot be granted in an interlocutory application therein.

22 L. W. 579 followed.

T. V. Viswanatha Aiyar for Plaintiff.

P. Srikantam for Defendant.

N. S.

Ramesam and Venkatasubba Rao, JJ. A. S. No. 32 of 1924.
6th August, 1928.

Hindu Law—Adoption—Anti-adoption agreement—Reservation of reasonable portion of the property for widow—Validity.

An anti-adoption agreement by which the adoptive father reserves a reasonable portion of the estate absolutely for his wife is not invalid.

S. Varadachari and *S. V. Venugopalachari* for Appellant.

T. R. Ramachandra Aiyar, K. S. Venkataramani, T. V. Ramanathan and *S. Panchapakesa Aiyar* for Respondents.

N. S.

Reilly, J. S. A. No. 1153 of 1924.
6th August, 1928.

Civil Procedure Code, O. 21, Rr. 90 and 92—Decree against a Hindu widow—Husband's property sold in execution—Right of reversioner to apply to have the sale set aside—Bar of suit.

In execution of a decree obtained against a Hindu widow, the properties of her husband were sold. The reversioner brought a suit for a declaration that the Court sale would be binding only during the lifetime of the widow and would not be binding on him as a reversioner.

Held, the reversioner ought to have applied under O. 21, R. 90, Civil Procedure Code to set aside the Court sale and he would not have a right of suit in default of such application, the same being barred under O. 21, R. 92 (3).

44 M. 351 and 24 L. W. 406 referred to.

K. Periasami Gounder for Appellant.

N. Doraisami Aiyar for Respondent.

N. S.

Reilly, J. S. A No. 824 of 1925.
6th August, 1928.

Limitation Act, Ss. 4 and 6—Three years' period mentioned in S. 6—Expiry during the vacation of the Court—Institution of the suit on the re-opening of the Court—Whether barred.

Where a suit was instituted on the re-opening of the Court, though the three years' period mentioned in S. 6 had expired during the vacation of the Court,

Held, that the suit was within time because Ss. 6 and 4 must be read together and the words "period prescribed" in S. 4 meant not only the period prescribed in the 1st Schedule of the Limitation Act but also such periods as were modified or extended by the provisions of S. 5 to S. 22 of the Act.

C. Rama Rao for Appellant.

P. Somasundaram for Respondent.

N. S.

Before Reilly, J. S. A. No. 756 of 1925.
31st July, 1928.

Malabar Tenants' Compensation Act I of 1900, S. 19—First lease in 1884 fixing rates of compensation—Subsequent renewals in 1897 and 1908—If tenant entitled to contract rate or rates, under the Section.

Where the property was originally leased to a tenant in 1884, which fixed rates of compensation and this was renewed in 1897 and 1908 and the present suit was brought in ejectment and the tenant claimed compensation under the Act.

Held, that the tenant is entitled only to contract rates for improvements prior to 1897 and for subsequent improvements he is entitled to rates only under the Act.

40 M. 594 followed.

S. A. 215 of 1924 not followed.

K. P. Ramakrishna Aiyar for Appellant.

D. A. Krishna Variar for Respondent.

N. S.

Wallace, J. Cr. Rev. Case No. 350 of 1928.
10th August, 1928.

Local Boards Act, Ss. 141, 142, 144 and 220—Burial of the dead body in an unlicensed place—Complaint preferred three months after the offence—If barred by limitation.

The accused was charged with an offence under S. 144 of the Local Boards Act for having buried the dead body of his brother in a place which was not duly licensed therefor. A complaint was preferred by the Taluq Board President three months after the commission of the alleged offence.

Held, that the complaint was out of time as under S. 220 it should be preferred within three months.

Held, further, that Ss. 141 and 142 of the Local Boards Act would be applicable only to cases where a place was sought to be used generally for burying dead bodies.

S. T. Srinivasagopalachari for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Reilly, J. Cr. Rev. Case No. 257 of 1928.
10th August, 1928.

Criminal Procedure Code, Ss. 144, 435 and 439—Proceedings under S. 144—Executive in their character—No revision lies to the High Court.

Where a Sub-Magistrate to whom a petition to take action under S. 144 of the Criminal Procedure Code was presented, dismissed it on the ground that the case properly fell under S. 147

of the Code and an application was made to the District Magistrate under sub-S. (4) of S. 144 who set aside the Sub-Magistrate's order and ordered enquiry on the same, and a revision was filed in the High Court under Ss. 435 and 439 of the Code against the District Magistrate's order,

Held, that proceedings under S. 144, Criminal Procedure Code, are executive in their character and consequently no revision lies to the High Court under Ss. 435 and 439 of the Code.

47 M. 56 and Cr. R. C. No. 400 of 1928 followed.

F. S. Vas for Petitioner.

C. A. Seshagiri Sastri and *K. Chandrasekharan* for Respondent.

[The learned Counsel for the petitioner also argued that the decision in Criminal Revision Case No. 400 of 1928 was erroneous and should be reconsidered and that the matter should be referred to a Bench of two Judges.—Ed.]

N. S.

Mackay, J. C. R. P. No. 1387 of 1927.
14th August, 1928.

Civil Procedure Code, O. 21, R. 2—Payment of amount towards decree—Payment not recorded in Court—Execution application mentioning the receipt of payment—Effect—Limitation Act, S. 20—Payment by judgment-debtor—Payment not specified whether for principal or interest—Bar when will save limitation.

Under O. 21, R. 2, Civil Procedure Code, Certificate of payment of amount towards decree can be made at any time and consequently the execution application wherein the amount was mentioned as paid can be treated as intimation to the Court of payment.

A payment by judgment-debtor to save limitation must be a payment towards principal or interest *as such* due under the decree. Where at the time of payment the judgment-debtor did not make any specific appropriation, the payment cannot be said to be a payment towards interest as such, even though at the time when the payment was made, a larger sum than the amount paid was due towards interest. The appropriation by the decree-holder the payment towards interest as such could not save limitation.

T. V. Muthukrishna Aiyar for Petitioner.

A. S. Sivakaminathan for Respondent.

N. S.

Madhavan Nair and Thiruvenkatachariar, JJ. C. M. A. No. 249 of 1927.
15th August, 1928.

Civil Procedure Code, O. 41, R. 23—Order of remand—Inherent power of Court—Appeal.

In a suit instituted by the plaintiff against his deceased brother's wife claiming that a certain policy taken by the husband of the defendant in a life insurance company was joint family property, it was found that the deceased had a general education out of the expense of joint family funds. The District Munsif consequently dismissed the plaintiff's claim. The District Judge, on appeal, held that the trial court had not adverted to the real points in the case and remanded the suit for fresh disposal after framing new issues.

Held, that the order of remand could not be one under O. 41, R. 23, as the decision of the District Munsif which was reversed was not upon a preliminary point, but the order was passed under the inherent jurisdiction of the Court and therefore no appeal lay.

E. Krishnamurthi for Appellant.

K. Ramamurthi for Respondent.

N.S.

Wallace, J. S. A. No. 1246 of 1925.
15th August, 1928.

*Malabar Law—Karnavan—*Ex parte *decree against Tarwad —Negligence of Karnavan—If binding on Tarwad.*

Where a Karnavan contested a suit in the first court, but was *ex parte* in appeal, as the tarwad was not sought to be made liable, but the appellate court passed a decree against the tarwad, and it was sought to be set aside on the ground of negligence of the Karnavan as he had good grounds of defence,

Held, that the Karnavan was not bound to defend every suit or appeal and if he honestly thought he need not defend and a decree is passed, it binds the tarwad.

20 M. 129 followed.

48 M. L. J. 351 referred to.

V. P. Karunakaran Nambiar for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Wallace, J. Cr. R. C. No. 214 of 1928.
15th August, 1928.

Penal Code, S. 268—Madras Local Boards Act, S. 162—If controls the former—Criminal Procedure Code, S. 537—Failure to take a sworn statement from the complainant—If illegal.

The fact that provisions have been made in the Madras Local Boards Act for preventing and dealing with the offence of public nuisance would not exclude the operation of S. 268, Indian Penal Code.

Failure to take a sworn statement from the complainant will not render the proceedings invalid as the same is merely an irregularity and not an illegality.

Watrap Subramania Aiyar for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Madhavan Nair, J. S. A. No. 854 of 1925.
16th August, 1928.

Practice—Suit—Agreement to abide by the result of connected suit, made orally to the court—Binding nature.

Plaintiff instituted a suit for an injunction against the 1st defendant in respect of an odai over which he and 2nd defendant had joint ownership. Subsequently he instituted a suit for partition against the 2nd defendant in respect of the land adjoining the said odai. He agreed by oral statements made to the court that if in the partition suit the land was allotted to the 2nd defendant, he would not prosecute his suit for injunction, which was therefore adjourned from time to time to await the result of the partition suit.

The partition suit ended in a compromise by which the land adjoining the odai was allotted to the 2nd defendant. The court dismissed the plaintiff's suit.

Held, that the dismissal was right, and that plaintiff should not be allowed to resile from his previous agreement.

B. Sitarama Row for Appellant.

S. Venkatachala Sastri for Respondent.

P. R. N.

Ramesam, J. C. R. P. No. 1160 of 1927.
17th August, 1928.

Landlord and tenant—Purchase of a portion of Agraharam—Liability for entire kattubadi—Civil Procedure Code, S. 115—Interference by High Court.

A purchaser of a portion of an Agraharam is liable only for a proportionate share of kattubadi on the Agraharam, and not for the entire kattubadi.

The High Court can interfere in revision, considering the far-reaching consequences of the case.

V. Pattabhirama Sastri for Petitioner.

T. Ramachandra Rao for Respondent.

N. S.

Reilly, J. Cr. R. C. No. 208 of 1928.
17th August, 1928.

Criminal Procedure Code, S. 199—Complaint by father for the offence of enticement of his married daughter while his son-in-law is alive—If maintainable.

The father of a married girl cannot prefer a complaint for the offence of enticement of his daughter while her husband is alive.

V. L. Ethiraj and *A. S. Sivakaminathan* for Petitioner.

The Public Prosecutor for the Crown.

A. Srirangachari for Respondent.

N. S.

Reilly, J. Cr. R. C. No. 344 of 1928.
17th August, 1928.

Criminal Procedure Code, S. 145—Omission to give reasons for the order—Legality of the order.

Where the Sub-divisional Magistrate merely filled the Form No. 22 of the 5th Schedule to the Criminal Procedure Code and did not give any reasons for passing the order under S. 145,

Held, that the order was illegal.

C. Narasimhachari for Petitioner.

M. S. Venkatramier for Counter-petitioner.

K. N. Ganapathi for the Public Prosecutor.

N. S.

Wallace and Thiruvenkatachariar, JJ. C. R. P. No. 762 of 1927.
20th August, 1928.

Civil Procedure Code, O. 21, R. 90—Grounds for setting aside sale—Questions to be considered—Minor defendant attaining majority after decree—Execution application—Notice of, not served on him—Sale if void.

The only questions to be considered in a petition under O. 21, R. 90 are (1) whether there was material irregularity or fraud in publishing and conducting the sale, and (2) whether there was any loss consequent to such irregularity or fraud. Where the Court considers these questions and finds that there was no substantial loss or injury, the sale should not be set aside.

It cannot be laid down that failure to serve notice of the execution application on a defendant who attains majority after decree, vitiates the sale.

A. S. Srinivasa Aiyar for Petitioner.

Dr. V. K. John for Respondent.

N. S.

N R C

Odgers, J. S. A. No. 1048 of 1928.
22nd August, 1928.

Promissory note—Payee executing Varthamanam on the same day agreeing to instalment payments within three years by the promissor—Validity of Varthamanam.

Where the defendant executed a promissory note for a certain sum in favour of the plaintiff, and the plaintiff on the same day executed a Varthamanam letter to the defendant to the effect that he would receive the amount due under the pro-note in instalments within three years,

Held, that the effect of the Varthamanam letter was to convert the promissory note under which money was payable on demand into an instalment bond and, as there was no consideration therefor, it was not enforceable.

T. Appaji Rao for *C. Sambasiva Rao* for Appellant.

T. M. Venugopal Mudaliar for Respondent.

N. S.

Reilly, J. Cr. R. C. Nos. 65 and 66 of 1928.
22nd August, 1928.

Canal and Public Ferries Act, S. 8—Notification by Government declaring portion of a river to be a ferry subject to the provisions of the Act—If ultra vires.

A notification issued by the Government under S. 8 of the Canal and Public Ferries Act declaring a portion of a river to be a ferry with the result that no person not duly authorised may convey goods, animals or passengers across the river within that portion, is clearly '*ultra vires*'.

C. Sidney Smith, Miss S. V. Devadoss and *P. Somasundaram* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice,
Beasley and Pakenham C. M. P. No. 471 of 1928.
Walsh, JJ.
23rd August, 1928.

Costs—Habeas Corpus *application—Withdrawal of—Power of Court to award costs.*

The Court has no power to award costs in a *habeas corpus* application which is withdrawn by the applicant.

K. S. Desikan for Petitioner.

V. V. Srinivasa Aiyangar for Respondent.

N. S.

Kumaraswami Sastri, J. C. S. No. 53 of 1924.
24th August, 1928.

Hindu Law—Inheritance—Sapinda relationship—Extent of degree requisite.

In determining the sapinda successionship, it is not the rule that seven degrees must be exhausted in one line before succession is traced to next line.

37 A. 604 (P.C.) referred to.

V. Raghunatha Sastriar for Plaintiff.

T. L. Venkatrama Aiyar, P. R. Ramakrishna Aiyar, V. Ramaswami Aiyar and *P. G. Krishna Aiyar* for Defendants.

N. S.

Madhavan Nair and
Thiruvenkatachariar, JJ. C.M.A. No. 349 of 1927.
27th August, 1928.

Civil Procedure Code, Sec. 11—Decision between co-defendants in prior suit—When res judicata.

A decision between co-defendants in a suit will have the effect of *res judicata* only if such a decision was necessary for giving a decree to the plaintiff.

In suits for redemption of kanom the question as to who effected the improvements and to whom compensation money is payable under the Improvements Act is one which has necessarily to be determined before giving relief to plaintiff and consequently the decision of such an issue between co-defendants will be binding upon them in a subsequent suit.

K. Kuttikrishna Menon for Appellant.

K. P. Krishna Menon for Respondent.

N. S.

Madhavan Nair and
Thiruvenkatachariar, JJ. C. M. A. No. 38 of 1928.
27th August, 1928.

Guardians and Wards Act, Sec. 25—Appointment of guardian —Claims of father.

As the father is bound under the Hindu Law to maintain the son, a very strong case must be made out before another person is appointed as guardian in preference to the father. The mere fact that the father has married a second wife or ill-treated his first wife is not a sufficient ground to deprive him of the custody of the minor child.

G. Lakshmanna for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Madhavan Nair and Thiruvenkatachariar, JJ. L. P. A. No. 298 of 1925.
27th August, 1928.

Civil Procedure Code, Sec. 11—Unnecessary decision—If has the effect of res judicata.

In a suit on a mortgage on an objection taken by the mortgagor that the plaintiff alone was not entitled to sue, and that there were others also interested in the mortgage money, those other persons who were minors were added as defendants. These minors put in a written statement disclaiming any interest in the mortgage sued on. The issue which was framed was whether the minor defendants were also interested in the mortgage and whether the suit was barred by limitation on account of their having been added as parties after the period of limitation. The Court found that the plaintiff alone was entitled to the mortgage amount and that therefore the suit was not barred by limitation and granted a decree to the plaintiff. Later on, the persons who were impleaded as minor defendants in the above suit instituted a suit to recover a moiety of the amount recovered by the plaintiff in the previous suit on the allegation that they were joint owners of the mortgage debt. The defendants pleaded that this suit was barred by *res judicata* by reason of the decision in the prior suit.

Held, that for a decision to operate as *res judicata* there must be a *lis* or *contest* between them and it must be necessary to decide that question for giving relief to the plaintiff and that in the present case there was no contest between the plaintiffs in the prior suit and the minor defendants therein and, the decision of the question as to whether the plaintiff alone is solely entitled to the mortgage amount or not was upon an immaterial point as the plaintiff in that suit would have been entitled to get a decree whatever was the decision on that question.

G. Lakshmanna and *K. Venkatarama Raju* for Appellant.

P. Somasundaram for Respondent.

N. S.

Wallace and Thiruvenkatachariar, JJ. C.R.P. No. 1203 of 1925.
27th August, 1928.

Civil Procedure Code, S. 115—Order allowing a claim petition —Revision.

No revision lies to the High Court against an order of the Lower Court allowing a claim petition as the party has a remedy by way of suit.

T. L. Venkatrama Aiyar for Petitioner.

P. N. Appuswami Aiyar for Respondent.

N. S.

The Chief Justice and
Mackay, J. O.S.A. No. 53 of 1927.
28th August, 1928.

Limitation Act, S. 13—Scope of—Exclusion of period of absence from British India—Person absent not a British Indian subject but a foreigner.

Under Sec. 13 of the Limitation Act the plaintiff can exclude the period of absence of the defendant outside British India even though the defendant was not a British Indian subject but a foreigner domiciled outside British India.

V. Ramaswami Aiyar for Appellant.

R. N. Aingar instructed by *V. Varadaraja Mudaliar* for Respondent.

N. S.

Devadoss and
Pakenham Walsh, JJ. A. S. No. 172 of 1924.
28th August, 1928.

Practice—Commission for effecting a partition—Commissioner's Report—No objection taken to the report in the first Court—Whether objection can be taken for the first time in appeal—Civil Procedure Code, O. 26, R. 14 (2)—No power given to Commissioner in warrant of Commission to award sums for equalising shares—Commissioner's report awarding sums to equalise shares—Legality of.

Where a Commissioner is appointed to effect a partition and the Commissioner submitted his report to the Court and no objection is made to the report in the first Court, there is no want of jurisdiction on the part of the Appellate Court to entertain objections to the same for the first time in an appeal from the decree based on the Commissioner's report.

6 M.H.C. 36 and 6 B.H.C.R. 149 referred to.

Where the warrant of Commission did not authorise the Commissioner to award sums to equalise shares, but none the less he awarded sums to equalise shares, the same may be given effect to by the Court, as a recommendation to the Court by the Commissioner.

C. A. Seshagiri Sastri for Appellants.

A. Krishnaswami Aiyar, T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Respondents.

C. A. S.

Devadoss, J. S. R. No. 11458 of 1927.
31st August, 1928.

Court Fees Act, Sch. II, Art. 17-A (3)—Suit by reversioner for a declaration that an adoption by a Hindu widow is untrue and invalid—Dismissal of suit—Appeal—Court-fee payable.

A reversioner brought a suit for declaration that an adoption by the Hindu widow is untrue, and even if true invalid. He valued it as a declaratory suit and paid a Court-fee of Rs. 100 though the properties to which the litigation related were worth more than Rs. 10,000. The suit was dismissed and an appeal was filed against the same.

Held, that the relief as regards the setting aside of the adoption was one which was capable of valuation, although the plaintiff may not get anything for himself, for if the plaintiff succeeds the adopted son loses his property, and that therefore the proper Court-fee payable was Rs. 500 under Art. 17-A (3) of Sch. II of Court Fees Act.

C. V. Harihara Aiyar for *Advocate-General* for Petitioner.

The Government Pleader for the Government.

N. S.

Madhavan Nair, J. S.A. No. 1805 of 1927.
31st August, 1928.

Limitation Act (1908), Art. 144—Co-owners—Ouster—Usufructuary mortgage by one co-owner—Knowledge of other co-owner.

In order to constitute adverse possession among co-owners there should be proof of ouster. The mere fact that one co-owner has effected a usufructuary mortgage of the common property is not by itself sufficient; there must be further proof that the same was brought to the notice of the other co-owner.

21 A. L. J. 204 followed.

B. Sitarama Rao and *B. V. Viswanatha Aiyar* for Appellants.

R. Jayaram and *T. S. Swaminathan* for Respondents.

N. S.

Devadoss, J. Cr. R. C. No. 934 of 1927.
31st August, 1928.

Survey and Boundaries Act—Prosecution before expiry of three years—Jurisdiction of Criminal Court to try the question of ownership.

A Criminal Court is not precluded from trying the question of ownership in a prosecution launched before the expiry of three years period mentioned in the Survey and Boundaries Act.

T. M. Krishnaswami Aiyar for Accused.

S. Panchapakesa Sastri for Complainant.

The Public Prosecutor for the Crown.

N. S.

Wallace and
Thiruvenkatachari, JJ. C.M.A. No. 408 of 1927.
31st August, 1928.

Execution—Dismissal of a suit by Official Receiver on behalf of insolvent—Decree for costs against the Official Receiver—Personal liability of the Receiver.

Where a suit was instituted on behalf of an insolvent by the Official Receiver, and the same was dismissed with costs, but the decree was not specific about its executability against the Official Receiver for costs personally,

Held, that the Official Receiver was personally liable for the costs awarded in favour of third parties though he could recoup himself from the estate.

51 I. C. 564 and 6 A. C. 484 referred to.

K. Kuttikrishna Menon for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

N. S.

Walsh, J.
31st August, 1928.

C.R.P. No. 699 of 1928.

Civil Procedure Code, Sec. 115—" Case "—Order amending issue.

An order amending an issue in a suit does not amount to a " case " within the meaning of Section 115 of the Civil Procedure Code. No question of jurisdiction is involved in such a case.

C.R.P. No. 697 of 1926 followed.

K. Balasubramania Aiyar for Petitioner.

K. S. Ramabhadra Aiyar and *T. P. Gopalakrishna Aiyar* for Respondent.

N. S.

Odgers, J.
3rd September, 1928.

S. A. No. 1414 of 1927.

Hindu Law—Partition—Suit for, by minors—Death of one minor plaintiff before decree—Whether the share of the deceased lapses to all or only to the plaintiffs.

Where a suit for partition was instituted by three minor plaintiffs against their step-brother, and one minor plaintiff died before the passing of the decree,

Held, that the share of the deceased plaintiff lapsed to all the parties including the defendant, as the severance in interest did not relate back to the institution of the suit but only could arise on the date of decree.

41 M. 442 followed.

48 M. 465 and 50 M. 866 referred to.

A. Krishnaswami Aiyar and *V. Balasundaram Aiyar* for Appellant.

P. Satyanarayana Rao and *Y. Suryanarayana* for Respondent.

N. S.

Coutts-Trotter, C.J.,
Ramesam and Pakenham
Walsh, JJ.
4th September, 1928.

Appeal No. 235 of 1924.

Transfer of Property Amendment Acts XXVII of 1926 and X of 1927—If retrospective—Signatures of the Registering Officer and of identifying witnesses—If attestation.

Held, by the Full Bench—

(1) Acts XXVII of 1926 and X of 1927 are retrospective.

(2) The signatures of the Registering Officer and of the identifying witnesses are a sufficient acknowledgment within the meaning of the Transfer of Property Act

1 Pat. 300 and 47 C. L. J. 118 referred to.

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthusami Aiyar* for 3rd and 4th Respondents.

T. S. Subramania Aiyar and *T. S. Srinivasa Aiyar* for 8th Respondent.

P. R. N.

Odgers, J.
4th September, 1928.

S. A. No. 906 of 1925.

Civil Procedure Code, S. 102—Suit of a small cause nature —Suit for damages for use and occupation—Question of title arising incidentally.

A suit for the recovery of less than Rs. 500 as damages for use and occupation is of a small cause nature and no second appeal lies.

The test to determine whether a suit is of a small cause nature or not is to find out from the allegations in the plaint whether the suit is one cognizable by the Court of Small Causes. The fact that a question of title incidentally arises, and the plaint is returned for representation on the Original Side will not make the suit cease to be one of small cause nature.

22 Mad. 149, 17 C. 541 and 3 M. 192 referred to.

K. Bhimasankaran for *B. Satyanarayana* for Appellant.

K. Kameswara Rao for Respondent.

N. S.

Odgers, J. S.A. Nos. 851 and 860 of 1925.
4th September, 1928.

Registration Act, Ss. 77 and 34—Suit for compulsory registration—Rules of limitation in S. 34—Applicability.

The plaintiff presented a document to the Registrar for registration eleven months after its execution, and the Registrar refused to register the document as the delay was not explained. In a suit instituted by plaintiff for a decree directing registration of the document,

Held, that S. 77 of the Registration Act was not governed by the period of limitation specified in S. 34 and the jurisdiction and powers of Civil Court in respect of such suits would not be tied down by the provisions as to periods of limitation prescribed in the Registration Act which were more or less departmental rules for the guidance of the Registering Officer.

K. V. Ramachandra Aiyar for Appellant.

S. Ramaswami Aiyar for Respondent.

N. S.

Curgenven, J. Cr. R. C. No. 996 of 1927.
5th September, 1928.

Penal Code, S. 425—Mischief—Destruction or change in value of property—Grazing by goats.

The offence of "mischief" is not committed by the grazing of grass by goats as it does not amount to "a change in the value or destruction" within the meaning of S. 425 of the Penal Code.

V. L. Ethiraj and *P. Krishnamachari* for Complainant.

K. N. Arunachallam Aiyar for Accused.

The Public Prosecutor for the Crown.

N. S.

Reilly, J. Cr. R. C. No. 1060 of 1927.
5th September, 1928.

Evidence Act, S. 74—Notification by Director-General of Post Offices for issue of certain stamps—If a public document.

A notification issued by the Director-General of Post Offices to the effect that chocolate coloured one anna stamps would be issued in the Post Offices, is not a public document within the meaning of S. 74 of Evidence Act.

V. L. Ethiraj, K. P. Padmanabha Pillai and *A. S. Sivakaminathan* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

N R C

Odgers and
Madhavan Nair, JJ. S.A. No. 934 of 1926.
5th September, 1928.

Muhammadan Law—Shafi School—Marriage of an adult virgin without her consent—Validity.

According to the Shafi School, the consent of an adult virgin is necessary for a valid marriage, and the father of the virgin can have no right to give her in marriage without her consent.

B. Sitarama Rao for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

N. S.

Wallace and
Thiruvenkatachariar, JJ. C.R.P. No. 234 of 1926.
6th September, 1928.

Civil Procedure Code, Sec. 151 and O. 9, R. 9—Ex parte *orders on applications under O. 21, Rules 97 to 100—Applicability—Inherent jurisdiction of Court to set aside the* ex parte *order.*

The following question was referred to a Full Bench :—

"Whether the provisions of O. 9, R. 9, C.P.Code, would be applicable to *ex parte* orders on applications put in under O. 21, Rules 97 to 100, and if the answer is in the negative whether the Court would have inherent jurisdiction in a proper case to set aside the *ex parte* order."

P. R. Srinivasan and *P. N. Appuswami Aiyar* for Petitioner.

S. Krishnaswami Aiyangar for Respondent.

N. S.

Coutts-Trotter, C.J.,
Kumaraswami Sastri and
Pakenham Walsh, JJ.
6th September, 1928.

In re the powers of the newly enrolled statutory advocates on the Insolvency Side.

The Indian Bar Councils Act (1926), Ss. 4 (2), 8, 14 and 19—Construction—Advocate—Right of, to act on the Insolvency Original Side—"Practise"—Meaning of.

Held, that Advocates enrolled under the Indian Bar Councils Act are entitled to act as well as plead on the Insolvency Original Side of the Madras High Court. The word 'practise' includes both pleading and acting.

A. Krishnaswami Aiyar for the Vakils' Association.

F. S. Vaz for the Bar Association.

V. V. Srinivasa Aiyangar for Attorneys' Association.

P. R. N.

Kumaraswami Sastri, J. O. P. No. 56 of 1928.
6th September, 1928.

Indian Companies Act, Sec. 163 (6)—Petition for winding up by dismissed shareholders—Legality of forfeiture—If can be raised in the petition—Profits declared not distributable till a time—If an ascertained debt.

A director who was removed from the list of shareholders for misconduct over 3 years prior thereto cannot question the legality of forfeiture collaterally in an application by him for winding up of the company. It must be agitated in independent proceedings.

4 Ch. App. 639 followed.

A director who claims a share of profits before they are declared or ascertained for the purpose of distribution cannot be deemed even a future creditor as the debt due to him is unascertained. For presenting a petition as a creditor, the debt due must be an ascertained debt though payable *in presenti* or in future.

(1910) 1 Ch. 574 followed.

N. K. Mohanarangam Pillai for Petitioners.

R. N. Aingar and *T. E. Ramabhadrachariar* for Respondent.

N. S.

Devadoss and Walsh, JJ. A. S. No. 263 of 1924.
12th September, 1928.

Evidence—Registry of property in a Municipal register in the name of a person—Pattas—If evidence of title.

An entry of property in a Municipal register in the name of a person is not any evidence of title of that person to the property. Pattas in respect of lands are evidence only of the engagement between the Government and the pattadar in respect of the kist payable and have very little value as evidence of title.

39 Bom. 664 (P.C.) and 44 All. 674 referred to.

B. Sitarama Rao and *K. Srinivasa Rao* for Appellant.

B. Somayya for Respondent.

N. S.

Ramesam and Reilly, JJ. A. S. No. 292 of 1923.
12th September, 1928.

Specific performance—Agreement to sell in favour of mortgagee—Sale price not fixed—Clog on equity of redemption.

A mortgagee who had advanced large sums of money on the mortgage entered into an agreement to purchase the mortgaged properties as part of the mortgage transaction, though the agreement was on a separate document six days subsequent to the mortgage. This agreement recited that, in consideration of the mortgagee having advanced large sums of money at a low rate of

interest, the mortgagors would sell the mortgaged properties to the mortgagee at a favourable or concession price and that, in default, the mortgagors would be liable to pay enhanced interest.

Held, that the agreement was void on the ground that it was uncertain, no price for the sale having been fixed therein and that it was a clog on the equity of redemption, being restrictive of the rights of the mortgagor and not a right of pre-emption as the sale price was to be less than the market price.

A. Krishnaswami Aiyar for Appellant.

The Advocate-General for Respondent.

N. S.

Devadoss and Mackay, JJ. A. S. No. 146 of 1924.
13th September, 1928.

Hindu Law—Joint family—Property standing in the name of a female member—Presumption—Benami.

There is no presumption that property standing in the name of a female member of a joint Hindu family belongs to the joint family. The burden is upon the person who alleges that it is joint family property to prove that it was purchased with joint family funds *benami* in the name of the female member.

G. Lakshmanna and *V. Viyyanna* for Appellant.

P. Somasundaram, P. Satyanarayana and *K. Ramamurthi* for Respondent.

N. S.

The Chief Justice and Walsh, J. L. P. A. No. 183 of 1927.
13th September, 1928.

Provincial Insolvency Act, Sec. 75, Proviso 2—Appellate order refusing to extend time for discharge—Second appeal.

No second appeal lies against the order of the District Court in appeal refusing to extend the time for discharge under Sec. 27 (2) of the Provincial Insolvency Act.

K. V. Sesha Aiyangar and *N. R. Raghavachari* for *V. C. Seshachari* for Appellant.

T. S. Anantharaman for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 1311 of 1927.
19th September, 1928.

Civil Procedure Code, Sec. 100—Question as to proof of custom—If a question of law—Mahomedan Law—Appointment of Mutawali by Jamait—Validity of.

The question as to proof of a custom is one of mixed law and fact and the evidence can be looked into in Second Appeal to find out whether the custom is legally established or not.

In the case of a public trust such as a mosque, Mahomedan Law does not recognise a right of appointment of Mutawali in the Jamait. A Jamait is merely a congregation of Mahomedan worshippers; and will be a fluctuating and indeterminate body.

V. Ramaswami Aiyar for *K. Rajah Aiyar* for Appellant.

M. A. Azim for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 948 of 1925.
19th September, 1928.

Provincial Small Cause Courts Act, Sch. II, Art. 13—Interest in immoveable property—Suit for recovery of cess—Civil Procedure Code, Sec. 11—Consent decree—When operates as res judicata.

A suit to recover a sum of money on the ground that it is a cess due from the defendant is not one to enforce payment of a cess payable to a person by reason of interest in immoveable property within the meaning of Sch. II, Art. 13 of the Provincial Small Cause Courts Act, where the cess is merely a voluntary payment.

53 M.L.J. 727 followed.

A consent decree would operate as *res judicata* in respect of matters which were specifically put in issue by the defendant in that suit though there was no trial of that issue.

A. Krishnaswami Aiyar for Appellant.

R. Ramamoorthi for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 628 of 1925.
19th September, 1928.

Transfer of Property Act, Sec. 54—Document creating a right of easement over immoveable property—Necessity for registration.

A right of easement is not part of the right of ownership in immoveable property and any dealing of such right does not fall within Sec. 54 of the Transfer of Property Act requiring a registered document. In India, there is no law requiring a document in writing for the creation of a right of easement.

A. I. R. 1926 Mad. 543 followed.

N B C

31 All. 612 referred to.

G. Lakshmanna for *A. Satyanarayana* for Appellant.

Y. Suryanarayana for Respondent.

N. S.

Reilly, J. Crl. R. C. No. 471 of 1928.

20th September, 1928.

Criminal Procedure Code, Secs. 228 and 231—Alteration of charge—Right of accused to have prosecution witnesses recalled for cross-examination.

In the case of an alteration of the charge, the accused has a right to have the prosecution witnesses recalled for further cross-examination, and a Magistrate has no discretion to refuse to recall the witnesses on the ground that the accused would not be prejudiced thereby.

Sec. 231 of the Criminal Procedure Code is not subject to the provisions of Sec. 228.

V. L. Ethiraj, K. S. Desikan and *M. Ranganatha Sastri* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Wallace and Thiruvenkatachari, JJ. C. R. P. No. 192 of 1926, C. M. P. No. 909 of 1926 and C. R. P. No. 1109 of 1926.

21st September, 1928.

Government of India Act, Sec. 107—Letters Patent, Clause 16—Madras Estates Land Act, Chap. II—Board of Revenue acting under—If subordinate to the High Court.

The following question was referred to a Full Bench : Whether the Board of Revenue acting under Chap. II of the Estates Land Act is a Civil Court, subject to the powers of superintendence of the High Court under Sec. 107 of the Government of India Act or Clause 16 of the Letters Patent.

V. V. Srinivasa Aiyangar, S. Varadachariar, K. Bhashyam Aiyangar and *K. Veeraraghavachariar* for Petitioner.

B. Jagannadha Doss for Respondent.

N. S.

Curgenven, J. C. M. P. No. 2282 of 1928.

1st October, 1928.

Civil Procedure Code, Order 41, Rules 20 and 22—Suit for partition against step-brothers—Defence that plaintiff born deaf and dumb and not entitled to a share—Decree for partition and maintenance to the mother who was a defendant—Appeal by step-brother on the ground that the plaintiff was not entitled to partition—Mother not impleaded as a respondent—Application by respondent in the appeal to bring mother as a party respondent in the appeal—Power of Court to order.

A suit for partition was filed against the step-brother and the mother of the defendant was also impleaded as a defendant. The step-brother pleaded that the plaintiff was born deaf and dumb and, therefore, not entitled to a share. The Court oberruled this plea and decreed the suit. It also decreed maintenance to the mother at a certain rate. The step-brother appealed on the ground that the plaintiff was not entitled to a share, impleading only the plaintiff as the respondent. He did not implead the mother as a party to the appeal. The respondent put in an application to have the mother impleaded as a respondent in the appeal so that he may file memo. of objections as regards the rate of maintenance awarded to her.

Held, that the mother, who had obtained a vested right by the failure of the respondent to appeal against the decree in her favour within the period of limitation could not be said to be a "party interested in the result of the appeal" within the meaning of Order 41, Rule 20 of the Civil Procedure Code, and therefore the Court had no power to implead her as a party to the appeal.

11 L. W. 602 and 6 R. 29 P. C. referred to.

P. Panni Rao for Petitioner.

N. Swaminathan and *M. Ramachandra Rao* for Respondent.

N. S.

Wallace, J. C. R. P. No. 1182 of 1927.
1st October, 1928.

Civil Procedure Code, Order 9, Rule 9—Dismissal of suit for default—Application for restoration—Sufficient cause—What amounts to.

An application was filed for restoration of a suit dismissed for default on the ground that the plaintiff could not attend Court on account of his being stung by a scorpion just about his starting from his village which was situated 25 miles from the Court-house.

This was dismissed on the ground that the applicant's previous conduct in not paying batta for witnesses and not being ready with the witnesses during the previous hearings made it apparent that he would not have attended the Court during this hearing also, even if the scorpion bite had not occurred. The same was confirmed on appeal.

Held, (on revision) that the order of the Lower Court should be set aside, as it did not consider the one question that it should concern itself with in a petition under Order 9, Rule 9, Civil Procedure Code, namely, the sufficiency or otherwise of the reason for the non-appearance of the petitioner on the day of hearing.

M. Ramachandra Rao for Petitioner.

T. Ramachandra Rao for Respondent.

N. S.

Odgers, J.
1st October, 1928.

S. A. No. 922 of 1925.

Civil Procedure Code, Order 41, Rule 27—Reception of additional evidence—Duty of Judge to give reasons.

An Appellate Court should give reasons when passing an order for reception of additional evidence; otherwise the order is illegal.

G. Lakshmanna for Appellant.

K. Kameswara Rao for Respondent.

N. S.

Madhavan Nair, J.
2nd October, 1928.

S. A. No. 1314 of 1927.

*Civil Procedure Code, Sec. 11—Suit for Rent—*Ex parte *decree—If operates as* res judicata *in a suit for rent for subsequent faslis.*

There is no general principle of law that an *ex parte* decree for rent will be *res judicata* as to the rate of rent in a subsequent suit for rent. The question will depend upon the facts and circumstances of each case as to whether there was an issue for the rate of rent and a decision thereon.

S. Venkatesa Ayyangar for Appellant.

Y. Suryanarayana for Respondent.

N. S.

Wallace and
Thiruvenkatachari, JJ.
4th October, 1928.

C. M. Ps. Nos. 2907 and 2908 of 1928.

Civil Procedure Code, Order 47, Rule 1—"Error apparent on the face of the record"—Meaning of.

The "error apparent on the face of the record" in Order 47, Rule 1, Civil Procedure Code, must be one upon any well-established or well-settled principle of law which the Court is bound to follow. Where the error is with reference to certain rules embodied in the Articles of a Company in respect of which there can be alternate constructions, such an error is not one apparent on the face of the record.

3 Lah. 127 and 47 Bom. 578 referred to.

T. R. Venkatarama Sastri and *M. S. Venkatarama Aiyar* for Petitioner.

S. Varadachariar, T. M. Ramaswami Aiyar and *S. T. Sreenivasagopalachari* for Respondent.

Reilly, J. Cr. R. C. No. 352 of 1928.
5th September, 1928.

Criminal Procedure Code, Sec. 250—Magistrate passing tentative order of compensation—Whether illegal.

A Magistrate acquitted the accused, and on the same date passed a tentative order awarding Rs. 50 as compensation to the accused in the absence of the complainant. Subsequently after hearing the complainant the tentative order was made absolute.

Held, that the order though not quite regular was not illegal and ought to be confirmed.

K. S. Jayarama Aiyar for Complainant.

E. Krishnamurthi for Accused.

The Public Prosecutor for the Crown.

N. S.

Coutts-Trotter, C. J. C. S. No. 38 of 1928 and
Beasley and Reilly, JJ. C. S. No. 112 of 1926.
4th October, 1928.

Madras High Court, Original Side Rules—O. 1 R. 7, O. 4, R. 19 and O. 6, R. 4—Scope—Dismissal of suit for default—Application to set aside dismissal made beyond time—Power of Court to restore—Practice.

Where a suit was dismissed under O. 6, R. 4 of the Original Side Rules for failure to file an affidavit of service as provided by O. 4, R. 19, and the plaintiff applied to have such dismissal set aside only after the expiration of 30 days prescribed by Rule 4 of O. 6, and the master refused the application, holding that the Court had no discretion to restore the suit or enlarge the time.

Held, that the Court had a discretion to revive the suit even after the expiry of thirty days and can extend the time under O. 1, R. 7, even though no application was filed within the thirty days fixed by O. 6, R. 4.

L.R. 3 Q.B.D. 83 and L.R. 4 Q.B.D. 402 distinguished.

L.R. (1920) 3 K.B. 140 followed.

K. S. Krishnaswami Aiyangar for Plaintiff in C. S. No. 38 of 1928.

K. P. Padmanabha Pillai for Plaintiff in C.S. No. 112 of 1926.

Defendant in both not represented.

P.R.N.

Madhavan Nair, J. S. A. No. 1117 of 1925.
5th October, 1928.

Malabar Tenants' Compensation Act (I of 1900), Secs. 3, 4 and 5—Improvement by tenant—Lands given on kanom for agriculture—Residential building put up by tenant—If tenant entitled

to compensation on eviction—Constructive waste—Suit brought before expiry of 12 years—Term expiring during pendency of suit—If Court can decree redemption.

Where a Jenmi sued to redeem a kanom before the expiry of the 12 years period, on the ground of waste by the tenant, but the term expired during the pendency of suit,

Held, the Court can give decree for redemption and take notice of events that occur after the suit was filed.

(1918) M.W.N. 199, 37 I.C. 962 and (1916) 1 M.W.N. 354 followed.

Where a tenant of agricultural lands put up in haste a big building with upstairs before expiry of term alleging it was useful for storing paddy and was a farm house,

Held, the building was not an improvement within Sec. 3 of the Act I of 1900 as it was inconsistent with the holding, and with the purpose for which it was let and the tenant cannot claim compensation for the same.

K. P. M. Menon and *K. K. Ranganatha Aiyar* for Appellant.

B. Sitarama Rao and *K. P. Ramakrishna Aiyar* for Respondent.

N. S.

Wallace and
Thiruvenkatachari, JJ.
9th October, 1928.

C. M. A. No. 530 of 1925.

Provincial Insolvency Act, Sec. 56—Fraudulent preference—Tests to determine.

The test to be applied to determine the fraudulent nature of an alienation is to determine the dominant motive of the insolvent in effecting the transfer. Where the dominant motive of the insolvent as disclosed by the evidence was not to prefer the particular creditor but to save himself from any action which could ruin his business if that creditor was not satisfied, the alienation cannot be said to amount to a fraudulent preference.

T. M. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for Appellant.

S. Varadachariar, S. Ramaswami Aiyar, T. L. Venkatarama Aiyar, K. R. Rama Aiyar and *S. Nataraja Nadar* for Respondent.

N. S.

Odgers, J. S. A. No. 1099 of 1925.
19th September, 1928.

Hindu Law—Joint family—Separation of one brother from others—Other brothers if divided inter se*—Widow—Alienation without necessity—Reversioner obtaining some properties from the alienees—Election.*

Where one brother separates from his two other brothers and takes away his share of the family properties, there is no presumption either that the other two are divided *inter se* or that they remain joint and their joint or separate status must be proved in the ordinary way.

45 M. L. J. 355 (P.C.), 30 Cal. 725 (P.C.) and 48 M. L. J. 83 (P.C.) referred to.

Where a Hindu widow alienated certain properties belonging to her husband's estate without legal necessity and the reversioner obtained for his minor daughter by way of maintenance some of the properties so alienated from the alienees who were her brothers-in-law

Held, that there was no "election to hold the deed good" within the meaning of 42 Mad. 523 (P.C.) as to debar the reversioner from claiming the other alienated properties after the widow's death.

Ch. Raghava Rao for Appellants (Alienees).

V. Govindarajachari for Respondents (Reversioner).

N. S.

Mackay, J. C. R. P. No. 1245 of 1927.
20th September, 1928.

Arbitration—Reference by guardian on behalf of minor—Validity—Award based partly on personal knowledge of arbitrators—Validity.

A reference to arbitration by a guardian on behalf of a minor is not invalid by reason of the fact that she consented to abide by the decision of a majority of the arbitrators.

38 M. L. J. 145 referred to.

Where a guardian consented to the arbitrators deciding with or without enquiry, but the decision of the arbitrators was based partly on evidence and partly on personal knowledge,

Held, that the award is valid and binding on the minor.

47 Mad. 30 and (1926) M. W. N. 445 referred to.

V. Govindarajachari for Petitioner.

Y. Suryanarayana for Respondent.

N. S.

N R C

Odgers, J. S. A. No. 2152 of 1927
8th October, 1928.

Negotiable Instruments Act, Sections 35, 94, 101, 102 and 119—Dishonour of Bill of Exchange by the drawer—Notice of dishonour to endorser—Mere demand for payment if amounts to notice of dishonour.

Where a Bill of Exchange has been dishonoured by the drawer, the payee in order to make the endorser liable must give a proper notice of dishonour under Section 94. The mere demand for payment does not amount to a notice of dishonour.

107 E. R. 1085 followed.

A mere protest will not amount to a notice of dishonour.

K. P. Ramakrishna Aiyar for Appellant.

K. Krishnaswami Aiyangar for Respondent.

N. S.

Reilly, J. Cr. R. C. No. 338 of 1928.
10th October, 1928.

Criminal Procedure Code, Sections 222, 225 *and* 233—*Entrustment of cocoanut husks for soaking—Single charge for deficiency of husks—Different sales alleged—Validity of single charge.*

Where the accused was charged with the offence of criminal breach of trust for not having accounted for 6,300 husks out of 1 lakh and odd of cocoanut husks entrusted to him for soaking, but the prosecution proved that the accused has sold these husks to different persons,

Held, the charge was bad as three distinct offences of criminal breach of trust had been alleged and the accused ought to have been charged separately for the same.

Semble: If section 222 applies only to cases of entrustment of money or to things also.

K. P. Ramakrishna Aiyar for Petitioner.

Venkataraghavachari for Public Prosecutor.

N. S.

Devadoss and Walsh, JJ. A. S. No. 166 of 1926.
12th October, 1928.

Malabar Law—Acquisition by sthance—Devolution of.

An acquisition made by a sthanee, unless it has been specifically made over to the sthanam, will go to the Tarwad of the sthanee. The onus of proving a custom in derogation of this law is upon the person who pleads the custom.

K. P. M. Menon and *P. Govinda Menon* for Appellant.

B. Sitarama Rao and *D. A. Krishna Variar* for Respondent.

N. S.

The Chief Justice,
Ramesam, Odgers, Venkata-
subba Rao and Mackay, JJ.
12th October, 1928.

O. S. A. No. 95 of 1926.

Letters Patent (Madras), cl. 12—"Suit for land"—Meaning of—Contract for sale of land situate outside the Madras City—Suit by prospective purchaser for specific performance of—If a suit for land—Maintainability on the Original Side of the High Court.

Held by the Full Bench.—A suit by a prospective purchaser for the specific performance of a contract for the sale of land situate outside the City of Madras is not a 'suit for land' within the meaning of clause 12 of the Letters Patent and is maintainable on the Original Side of the High Court where the defendants reside within the limits of its ordinary original jurisdiction.

A suit for specific performance is only an action *in personam,* while a 'suit for land' is an action *in rem.*

A suit for specific performance of a contract for the sale of land should not be regarded as suits for maintenance charged on land, suits for compensation for trespass on immoveable property or suits on mortgages.

T. M. Krishnaswami Aiyar and *M. Subbaroya Aiyar* for Appellants.

K. S. Krishnaswami Aiyangar and *T. Ramachandra Rao* for Respondents.

P. R. N.

Madhavan Nair and
Thiruvenkatachari, JJ.
12th October, 1928.

C. M. P. No. 327 of 1928.

Civil Procedure Code, Sec. 110—Confirming judgment—Slight variation—Effect.

In order to constitute a judgment of the High Court not a confirming judgment, the point of variance must be one affecting the particular subject-matter proposed to be taken up on appeal to the Privy Council.

51 Cal. 969 (P.C.) explained.

B. Somayya for Petitioner.

L. A. Govindaraghava Aiyar for Respondent.

N. S.

Reilly, J.
12th October, 1928.

Cr. Appeal No. 249 of 1928.

Criminal Procedure Code, S. 476—Complaint under—Contents of.

An order under Sec. 476, Criminal Procedure Code, must contain reasons in writing and must also contain a finding that the enquiry is necessary in the ends of justice.

Y. Suryanarayana for Appellant.

K. Venkatavaradachari for the Public Prosecutor.

N. S.

Mackay, J. S. A. No. 828 of 1925.
15th October, 1928.

Contract—Immoveable property—Time when of the essence of contract.

Time is of the essence in a contract to the recovery of immovable property and the terms of the contract must be strictly complied with.

Where a contract to recover immovable property provided that the purchase money should be paid in three equal annual instalments and that on such payment the property should be recovered but the amount was not paid in such instalments though it was duly tendered before the expiry of the third year

Held, the contract was not complied with and specific performance of the agreement to recover could not therefore be decreed.

42 Mad. 802, Fisher on Mortgages, Part II, Ch. I, S. 18, Fry on Specific Performance, Section 1103, 39 E. R. 195 and 7 E. R. 82 referred to.

V. Govindarajachari for Appellants.

The Hon'ble Mr. *V. Ramadoss* for Respondent.

N. S.

Kumaraswami Sastri, J. C. S. No. 156 of 1928
17th October, 1928.

Transfer of Property Act, Secs. 100 and 127—Settlement—Settlement of house to a person subject to a prior life-estate—Direction to pay a specific amount when taking the property—Charge.

A settlement deed was executed by which some properties were given absolutely to a person subject to a life-estate and he was directed to pay a certain amount to another when taking the property. There was no clause directing that the amount should be paid out of the value of the house.

Held, that no charge was created in favour of the person to whom the amount was directed to be paid.

38 Mad. 500 followed.

42 Mad. 581 distinguished.

B. Somayya for Plaintiff.

V. Ramaswami Aiyar for Defendant.

N. S.

The Chief Justice and Mackay, J. O. S. A. No. 79 of 1927.
15th October, 1928.

Execution—Attachment—Increase of decree amount by the Appellate Court—Attachment if enures for this increased amount—Civil Procedure Code, Order 38, Rule 9—Dismissal of suit—Failure to order withdrawal of attachment—Effect—Adjudication of defendant as insolvent—Effect on attachment—Right of Official Assignee to object to alienation by the judgment-debtor.

The following questions were referred to a Full Bench :—

1. Where the Appellate Court allows the claim dismissed by the Original Court or varies the decree of the Original Court by allowing a larger amount, does the attachment enure to the amount decreed by the Appellate Court?

2. Where a Court dismissing a suit fails to order the withdrawal of an order for attachment before judgment as required by Order 38, Rule 9, does the attachment continue notwithstanding the fact of the dismissal of the suit?

3. Does an attachment before judgment subsist after the adjudication of the defendant as an insolvent?

4. If the Question (3) be answered in the affirmative, can the Official Assignee object to an alienation by the judgment-debtor subsequent to the attachment.

V. V. Srinivasa Aiyangar, T. D. Srinivasachari and *T. Chakravarti Aiyangar* for Appellants.

K. S. Krishnaswami Aiyangar and *K. Krishnaswami Aiyangar* for Respondents.

N. S.

The Chief Justice, Kumaraswami Sastri, Wallace, Beasley and Pakenham Walsh, JJ. S. R. No. 12176 of 1928.
18th October, 1928.

Letters Patent (Madras)—Amended Letters Patent (1928)—Applicability—Clause requiring certificate of leave to file Letters Patent Appeal from a decision of a single Judge in Second Appeals—Operation of—Right of appeal—Law governing.

A Second Appeal arising out of a suit of the year 1920 was filed in the High Court on the 15th July, 1924, and was finally disposed of by a single Judge of the High Court on the 9th February, 1928. A Letters Patent Appeal was filed against the decision on the 24th April 1928. The Amended Letters Patent, requiring a certificate of leave to file such an appeal, having come into force on the 31st January, 1928, the question arose, whether in this case, such a certificate was necessary or whether the party had a right to file the same without such certificate as under the old Letters Patent.

N R C

Held by the Full Bench.—(i) That the case was governed not by the Amended Letters Patent, but by the old Letters Patent and that no certificate of leave to file a Letters Patent Appeal was necessary.

(ii) The right of appeal is a substantive right and is governed by the law which prevailed at the time the suit was commenced, and cannot be deemed to be taken away by a later enactment, unless the enactment expressly or by necessary implication abrogates that right.

(1905) A.C. 369 (P.C.) and 48 C.L.J. 150 (F.B.) followed.

A. Krishnaswami Aiyar and *T. S. Srinivasa Aiyar* for Appellant.

The Government Pleader for the Office.

P. R. N.

Wallace and
Thiruvenkatachari, JJ. C. M. A. No. 414 of 1927.
25th October, 1928.

Insolvency—Composition scheme—Acceptance of—Subsequent annulment of insolvency—Right of creditor to prove claim subsequent to annulment.

A creditor of an insolvent whose adjudication has been annulled on the acceptance of a composition scheme by the court can prove his claim in insolvency subsequent to the annulment so as to be entitled to get the benefit of the composition scheme.

V. Ramaswami Aiyar for Appellant.

V. S. Narasimhachari for Respondent.

N. S.

Venkatasubba Rao
and Walsh, JJ. S. A. No. 1433 of 1925.
26th October, 1928.

Promissory note—Construction—Note in the name of a person who was described as a guardian of a minor—Guardian whether the real payee of the note.

A promissory note recited that it was executed to one 'L' who was the guardian of a minor 'R' and that that note was executed for the balance of the amount due in respect of an earlier promissory note executed in favour of one 'S' as guardian of the minor 'R'. The question arose as to who was the real payee under the note, the guardian himself or the minor represented by the guardian.

Held, that the real test was to find out from the language of the instrument who was the real payee under the note and the recital in the pronote showed that it was the minor who was the real payee.

T. V. Muthukrishna Aiyar for *K. V. Krishnaswami Aiyar* for Appellant.

R. Kesava Aiyangar for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 1049 of 1925.
26th October, 1928.

Contract—Offer and acceptance.

The plaintiff who was a merchant in Quilon after some preliminary enquiries from the defendant who was a rice merchant in Rangoon sent him a telegram to send thousand bags of rice by March shipment. The defendant replied that steamers were expected shortly and that he will inform afterwards. The plaintiff treating this as an acceptance of his offer brought a suit for damages for breach of contract. The defendant pleaded that there was no concluded contract between the parties.

Held, that the reply of the defendant was not an acceptance of the plaintiff's offer but was only a further stage in the negotiations between the parties in respect of the shipment of rice.

T. V. Muthukrishna Aiyar for Appellant.

P. Venkataramana Rao for Respondent.

N. S.

Waller, J. Cr. Rev. Case No. 601 of 1928.
29th October, 1928.

Evidence Act, Sec. 30—Confessional statement by co-accused in the dock—Admissibility.

The confessional statement made by a co-accused in the dock cannot be treated as a confession under Sec. 30 of the Evidence Act.

45 All. 324 approved.

38 Mad. 302 doubted.

N. K. Mohanarangam Pillai for Petitioner.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice,
Beasley and Reilly, JJ. O. P. No. 165 of 1928.
29th October, 1928.

Income-tax Act (1922), Ss. 33 (2), 66 (2), proviso—Applications for review and reference—Review decided partly in favour of assessee—Orders passed on both on the same day—Fees paid in respect of application for reference—Refund of.

An assessee preferred an application for review as well as an application for reference. On the application for review the Commissioner decided one point in favour of the assessee and the rest against him. The reference application was not argued as it involved the same point as the review application. The Commis-

sioner, however, disposed of the two applications together by the same order. Six months later, the assessee applied for refund of the fees deposited by him under S. 66 (2), stating that he did not wish to proceed with the application for reference in the High Court, but the Commissioner, holding that the application could not be withdrawn, as it had already been decided and refused to refund the amount.

Held, that the Commissioner was not right in disposing of the two applications together and that the proper course was to decide the review application first so as to give an opportunity to the assessee to withdraw or not the reference application and that in the circumstance the fees deposited should be refunded to the assessee.

K. P. Ramakrishna Aiyar for Assessee.

M. Patanjali Sastri for the Commissioner of Income-tax.

P. R. N.

The Chief Justice,
Madhavan Nair and Jackson, JJ. L. P. A. No. 93 of 1926.
1st November, 1928.

Hindu Law—Widow—Gift by—Presumptive reversioner consenting without receiving any benefit—Right to question the alienation after widow's death—Estoppel.

Where a Hindu widow made a gift and the presumptive reversioner executed a deed of relinquishment in favour of the alienee, consenting to such gift, during the widow's lifetime, but later sued for declaring such alienation as not valid and binding on the reversion and contended that he was not estopped from questioning the alienation as he had received no benefit for the consent he had given :

Held, that he having consented to the alienation in question, though without receiving any benefit, the consent operated as a bar and that he was not entitled to question the validity of the alienation if he became the actual reversioner on the death of the widow.

V. Govindarajachari for Appellant.

Ch. Raghava Rao for Respondent.

P. R. N.

Wallace and
Thiruvenkatachari, JJ. C. C. C. A. No. 25 of 1926.
1st November, 1928.

Limitation Act, Art. 44—Sale by guardian of minor—Suit by a transferee from the minor to set aside sale—Limitation.

A suit to set aside a sale made by the guardian of a minor must be brought within three years of the date of attainment of majority by the minor, whether the suit is instituted by the minor himself or by a transferee from him.

M. S. Venkatarama Aiyar and *K. Aravamuda Aiyangar* for Appellant.

K. Ramanadha Shenai and *Sanjeevi Kamath* for Respondent.

N. S.

Devadoss and
Walsh, JJ. A. S. No. 203 of 1925.
1st November, 1928.

Hindu Law—Illegitimate son of a Sudra—Right to a share in the family properties of his putative father.

An illegitimate son of a Sudra is not entitled to obtain a share in the family properties of his putative father who died leaving behind him his undivided brothers and brothers' sons.

S. Varadachari and *K. Narasimha Aiyangar* for Appellant.

T. R. Venkatarama Sastri, K. Bhashyam Aiyangar and *K. Raghavachari* for Respondent.

N. S.

Reilly, J. Cr. M. P. No. 753 of 1928.
1st November, 1928.

Criminal Procedure Code, Sec. 497 (5)—Bail granted by a High Court—Power of Magistrate or Sessions Judge to cancel the bail.

Under Sec. 497 (5) of the Criminal Procedure Code it is only the High Court that can cancel the bail granted by it.

N. Kunjidapadam for Accused.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice,
Kumaraswami Sastri and
Pakenham Walsh, JJ. C. S. No. 145 of 1925.
2nd November, 1928.

Limitation Act, Arts. 66 and 116—Applicability—Registered mortgage deed—Personal covenant—Suit to enforce—Limitation—Article applicable.

N R C

Art. 116 and not Art. 66 of the Limitation Act governs a suit to enforce the personal covenant in a registered mortgage bond, the period of limitation being six and not three years.

Observations of the Privy Council in 7 A. 502 and 5 Pat. 585 explained.

K. S. Krishnaswami Aiyangar and *P. S. Ramaswami Aiyangar* for Plaintiff.

V. V. Srinivasa Aiyangar and *T. M. Seshachela Aiyar* for Defendant.

P. R. N.

Wallace and Thiruvenkatachari, JJ. L. P. A. No. 46 of 1928.
7th November, 1928.

Letters Patent (Madras), clause 15—Judgment—Order staying further proceedings on terms pending an appeal from the preliminary decree in a mortgage suit.

An order staying further proceedings on terms pending an appeal from the preliminary decree in a mortgage suit is not a "judgment" within the meaning of clause 15 of the Letters Patent and is therefore not appealable.

35 M. 1 (F. B.) referred to.

K. S. Venkatramani for Appellant.

T. M. Ramaswami Aiyar for Respondent.

N. S.

The Chief Justice and Walsh, J. O. S. A. No. 38 of 1926.
8th November, 1928.

Hindu Law—Joint family—Separation of one member from the other members—Subsequent partition between the other members—Share of separated member if can be taken into account.

The following question was referred to a Full Bench :—" If a member of a joint Hindu family gets separated from the other members, should his share be taken into account in a subsequent partition between the other members who remained joint for the purpose of calculating their shares as held in 5 Mad. 362."

K. S. Krishnasami Aiyangar and *P. V. Sudarsana Raju* for Appellant.

V. V. Srinivasa Aiyangar, T. L. Venkatarama Aiyar and *V. Ramaswami Aiyar* for Respondent.

N. S.

The Chief Justice and Walsh, J. S. A. No. 1488 of 1925.
8th November, 1928.

Contract Act, Sections 107 and 176—Right of sale of pledgee—Pledgee if bound to sell at the most favourable price.

The provisions of section 176 of the Contract Act are not analogous to section 107 and a pledgee is not bound to sell the pledged article at the most favourable price.

S. Varadachariar and *N. Muthuswami Aiyar* for Appellant.

N. S. Srinivasa Aiyar for Respondent.

N. S.

Walsh, J. C. R. P. No. 633 of 1928.
9th November, 1928.

Madras District Municipalities Act, Sections 49 to 51—Disqualification of elected Councillor—Remedy.

The following question was ordered to be referred to a Bench or Full Bench :—

" Can the disqualification of an elected Councillor under Sections 49 and 50 of the Madras District Municipalities Act be made the subject-matter of an election petition or is the remedy limited to an application under Section 51 or 314 of the Act."

K. Bhashyam Aiyangar for Petitioner.

T. M. Krishnaswami Aiyar and *T. E. Ramabhadrachariar* for Respondent.

N. S.

The Chief Justice and Walsh, J. L. P. A. No. 263 of 1925.
9th November, 1928.

Transfer of Property Act, Sec. 52—Lis pendens—*First mortgagee obtaining a second mortgage and filing a suit on both—Decree and Court sale pending ejectment suit—Purchaser if affected.*

The following question was referred to the decision of a Full Bench :—

" If during the pendency of a suit for ejectment against a person in respect of an item of immoveable property, the first mortgagee from that person on that property obtains a second mortgage over the same property, files a consolidated suit upon both the mortgages, and in execution of the decree in that suit the property is purchased in Court auction, is the auction purchaser affected by the doctrine of *lis pendens* by the decree passed in the ejectment suit."

S. Varadachariar, K. Sundara Rao and *P. Vedachala Aiyar* for Appellant.

B. Sitarama Rao for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
9th November, 1928.

C. M. A. Nos. 193, 487 and 566 of 1925, 135, 137 and 407 of 1926, and 143 of 1927.

Civil Procedure Code, Order 21, Rule 22—Execution application—Death of judgment-debtor subsequent to application—No application to bring legal representative on record filed—Absence of notice to his sons—Effect.

The omission to give notice to the judgment-debtor under Order 21, Rule 22, C. P. Code, amounts to an illegality which will vitiate the Court sale. But, if at the time the execution application is filed, the judgment-debtor is properly represented, his subsequent death and the omission to bring his proper legal representatives on record do not vitiate the sale.

S. Varadachariar, C. Padmanabha Aiyangar and *T. M. Ramaswami Aiyar* for Appellants in C. M. A. No. 487 of 1925.

The Advocate-General, T. R. Ramachandra Aiyar, A. Krishnaswami Aiyar, M. Subbaroya Aiyar, V. Ramaswami Aiyar, K. Umamaheswara Aiyar, R. Rangaswami, S. Krishnaswami Aiyangar and *M. Patanjali Sastri* for Respondents in C. M. A. No. 487 of 1925.

A. Krishnaswami Aiyar, T. M. Krishnaswami Aiyar and *K. Umamaheswara Aiyar* for Appellants in C. M. A. No. 566 of 1925.

T. R. Ramachandra Aiyar, T. M. Ramaswami Aiyar, M. Subbaroya Aiyar, V. Ramaswami Aiyar, P. N. Appuswami Aiyar, S. Srinivasa Aiyar and *M. Patanjali Sastri* for Respondents in C. M. A. No. 566 of 1925.

N. S.

Odgers and Curgenven, JJ. A.S. Nos. 281 of 1925 and
13th November, 1928. 196 of 1926.

Part-performance—Vendor suing the vendee in ejectment—Sale deed not registered on account of vendee's default—Plea of part-performance if can be set up in defence.

Where the plaintiff agreed to sell certain lands to the defendant and in pursuance of the said agreement put the defendant in possession, executed a sale-deed which, however, was not registered on account of no fault of the vendor, and the vendor subsequently sued the vendee for ejectment, *held,* that the defendant-vendee could not set up in defence the equitable doctrine of part-performance.

Essentials of the doctrine of part-performance pointed out.

Ch. Raghava Rao for Appellant.

P. Satyanarayana Rao for Respondents.

N.S.

Curgenven, J. Cr.R.C. No. 373 of 1928.
13th November, 1928.

Criminal Procedure Code, S. 265 (2) & (3)—*Bench of Magistrates—Judgment signed only by the President and not by the other members of the Bench—Validity.*

The failure of the Magistrates forming the Bench of Magistrates to sign the judgment is an illegality, although the judgment has been signed by the President, and the conviction must be set aside.

M. A. T. Coelho for Petitioner.

K. S. Vasudevan for *The Public Prosecutor* for the Crown.

N.S.

Wallace and Thiruvenkatachariar, JJ. L.P.A. No. 116 of 1926.
14th November, 1928.

Provincial Insolvency Act (*III of* 1907), *S.* 16 (2) (*b*)—*Suit by attaching creditor under Order* 21, *Rule* 63 *to set aside claim order—Insolvency of judgment-debtor subsequent to claim order but before the filing of the suit—Leave of Court—Necessity of—Decree in suit filed without such leave—Validity.*

Where, subsequent to the order on a claim petition allowing the claim, the judgment-debtor was adjudicated insolvent and subsequently the attaching creditor filed a suit under O. 21, R. 63 of the Civil Procedure Code to set aside the claim order without obtaining the leave of the Insolvency Court and obtained a decree declaring that the property was that of the judgment-debtor,

Held, (1) that the attaching creditor's suit was not such a suit as was contemplated by section 16 (2) (*b*) of the Provincial

Insolvency Act of 1907 and therefore leave of the Insolvency Court was not necessary to the suit, and

(2) that, even if such leave was necessary, the decree passed in the suit without such leave, no objection having been raised by the defendant, was null and void.

B. Somayya for Appellant.

T. M. Krishnaswami Aiyar and *B. C. Seshachala Aiyar* for Respondent.

N.S.

Kumaraswami Sastri, J. C.S. No. 473 of 1928.
20th November, 1928.

Civil Procedure Code, Order 40, *Rule* 1—*Suit on simple mortgage—Jurisdiction of Court to appoint receiver.*

Ordinarily, a Court will not appoint a receiver in a suit on a simple mortgage; but where the mortgage security is insufficient, the Court will have jurisdiction to appoint a receiver.

Cases on the subject reviewed.

A. Suryanarayana for Plaintiff.

K. S. Krishnaswami Aiyangar and *T. N. C. Srinivasavaradachari* for Defendant.

N.S.

Wallace and Thiruvenkatachariar, JJ. C.M.P. Nos. 2056 to 2068 of 1928.
21st November, 1928.

Civil Procedure Code, S. 109 (*a*)—*Final order—Order of remand.*

Where the High Court reversed the decision of the Lower Court and remanded the case for trial to the Lower Court, holding that the Civil Court had jurisdiction to try the case, *held,* that the order was a "final order" within the meaning of S. 109 (*a*), Civil Procedure Code.

41 M. 724 and 43 M. 166 referred to.

46 M. 92 followed.

V. Ramadas and *P. Satyanarayana Rao* for Petitioner.

Ch. Raghava Rao for Respondent.

N.S.

Waller and Madhavan Nair, JJ S.A. No. 1452 of 1925.
23rd November, 1928.

Easement—Natural right and customary right—Right to drain rain water collected on one's land over adjacent owner's land—Similar right to drain off water collected for agricultural purposes.

The right to drain off rain water falling on one's land over the adjacent owner's land is a natural right but the right to drain off water brought or collected on one's land for purposes of agriculture over the adjacent owner's land is not a natural right but a customary right.

B. Sitarama Rao for Appellant.

K. S. Sankara Aiyar for Respondent.

N.S.

Phillips and Thiruvenkatachariar, JJ. A.S. No. 286 of 1924.
27th November, 1928.

Forest Act, Ss. 18 *and* 21—*License granted under the Act—Licensee employing agents—Partnership—Legality.*

In respect of licenses granted under the Forest Act the licensee is permitted to employ agents for the purpose of cutting or transporting timber.

A partnership entered into by the licensee with other persons by which they agreed to finance him in the cutting and transporting of timber and the sale of the produce in return for a share of the profits is not illegal.

A. Krishnaswami Aiyar and *A. Satyanarayana* for Appellant.

C. S. Venkatachariar, P. Somasundaram, P. Satyanarayana, T. M. Krishnaswami Aiyar and *A. Venkatachalam* for Respondent.

N.S.

Devadoss and Waller, JJ. Cr.R.C. No. 424 of 1928.
27th November, 1928.

Evidence Act, S. 132—*Privilege by witness—When can be claimed—English Law.*

The rule of absolute privilege which obtains in England with regard to statements of a witness is not applicable to India.

A witness can claim privilege under section 132 of the Evidence Act only if he has been compelled to answer such questions and claimed privilege before answering such questions.

V. L. Ethiraj and *A. S. Sivakaminathan* for Petitioner.

T. K. Srinivasathathachari for Complainant.

The Public Prosecutor for the Crown.

N.S.

Waller and Madhavan Nair, JJ. L.P.A. No. 198 of 1925.
29th November, 1928.

Practice—Second appeal—New plea that suit barred by S. 47 *of the Civil Procedure Code—If can be raised.*

A plea that the suit is barred by section 47 of the Civil Procedure Code ought not to be allowed to be raised for the first time in second appeal.

32 M. 425 referred to.

B. Somayya for Appellant.

B. Sitarama Rao and *K. V. Sesha Aiyangar* for Respondent.

N.S.

Phillips, J. C.R.P. No. 245 of 1928.
29th November, 1928.

Civil Procedure Code, Order 32, *Rule* 3—*Appointment of guardian on false affidavit—Minor if can be said to be properly represented.*

Where a Court guardian was appointed for a minor defendant on a false allegation contained in the affidavit of the plaintiff that the testamentary guardian of the minor declined to act as guardian,

Held, that the minor should be deemed not to have been represented at all and the decree against him must be set aside.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

T. S. Anantaraman for Respondent.

N.S.

Wallace and Thiruvenkatachariar, JJ. S.A. No. 209 of 1925.
29th November, 1928.

Decree—Wrong person bona fide *impleaded as legal representative—Decree against—If binds the proper legal representative.*

Where a wrong person is brought on record as the legal representative in good faith, he must be taken to represent the estate sufficiently and a decree passed against him binds the estate.

E. Krishnamurthi for Appellant.

Y. Suryanarayana for Respondent.

N.S.

Waller and Madhavan Nair, JJ. L.P.A. No. 179 of 1927.
29th November, 1928.

Letters Patent, clause 15—*Order of remand by single Judge of High Court—Absence of appeal from the order—Final decree by single Judge of High Court after remand—Appeal—Legality of remand order if can be questioned.*

The fact that a person did not appeal from the order of remand passed by a single Judge of the High Court does not prevent him from questioning the legality of the order of remand in an appeal from the final decree of the single Judge passed after the order of remand. Clause 15 of the Letters Patent is not controlled by section 105 of the Civil Procedure Code.

T. R. Ramachandra Aiyar, S. Krishnamachariar and *K. P. Ramakrishna Aiyar* for Appellant.

C. Narasimhachariar for Respondent.

N.S.

The Chief Justice,
Odgers and Beasley, JJ. O.P. No. 138 of 1928.
29th November, 1928.

Income-tax Act, S. 10 (2) (*vi*)—*Business of firm as going concern taken over by another firm—Machinery of—Depreciation allowance for—Arrears of—Succeeding firm—Right of to deduction of arrears in computing profits.*

Where the business of a firm was taken over as a going concern by another firm, and such old firm was entitled to a deduction of arrears of depreciation allowance in respect of machinery, *held*, that under section 10, clause (2), sub-clause (*vi*) of the Income-tax Act the succeeding firm was entitled to claim deduction of such arrears of depreciation allowance on the basis of the original value of the machinery in computing profits for purposes of income-tax.

M. Patanjali Sastri for the Commissioner of Income-tax.

Nugent Grant for Assessee.

P.R.N.

Phillips, J. C.R.P. No. 47 of 1928.
29th November, 1928.

Practice—Appointment of guardian to one who is neither a minor nor a lunatic—Validity.

Where the whereabouts of a party who was not a minor were not known and on the evidence he could be presumed neither to be mad nor dead and the Lower Court appointed his wife as his guardian to look after his interests in the proceedings,

N. R. C.

Held, that the Court had no jurisdiction to appoint the guardian but must have only directed substituted service of summons and proceeded *ex parte.*

4 Pat. 378 not followed.

T. S. Venkatesa Aiyar for Petitioner.

K. S. Desikan and *S. Panchapagesa Sastri* for Respondents.

N.S.

Odgers and Jackson, JJ. L.P.A. No. 425 of 1926.
5th December, 1928.

Will—Construction—Devise of properties in favour of second wife—"Hukdarlu"—Limited or absolute estate.

Where a husband after discarding his first wife for unchastity, devised his properties, moveable and immoveable, in favour of his second wife and made her the "Hukdarlu" of the properties,

Held, that in the absence of words of sufficient amplitude to confer an absolute title, the mere use of the term "Hukdarlu" would only give her such right or title as a Hindu widow would get.

P. Satyanarayana Rao for Appellant.

B. Somayya and *V. Suryanarayana* for Respondent.

N.S.

Wallace and Madhavan Nair, JJ. L.P.A. No. 334 of 1926.
6th December, 1928.

Hindu Law—Adoption—Illatom—If applicable among Tamil Udayar community.

The custom of Illatom adoption is known only in Telugu districts and not applicable among the Tamil Udayars of Trichinopoly district.

A. V. Narayanaswami for Appellant.

V. Viswanatha Sastri for Respondent.

N.S.

[END OF VOL. LV.]